No. 82-1549

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

VICTOR DOMINGO GARCIA, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

KATHRYN A. OBERLY
Assistant to the Solicitor General

JOEL M. GERSHOWITZ
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the Fourth Amendment exclusionary rule may be invoked in a federal criminal prosecution to suppress the evidentiary fruits of investigative stops and ensuing searches that met the constitutional standards of reasonable suspicion and probable cause but were technically illegal under state law because the arresting officers—state game wardens—lacked statutory authority to make arrests for non-game law violations occurring outside of state parks.

2. Whether, assuming it is sometimes appropriate to apply the exclusionary rule on the basis of the illegality of a stop under state law, the evidentiary fruits of the stops in this case nevertheless should be admissible because the arresting officers reasonably believed that they were acting within the scope of their authority.

3. Whether the application of a "reasonable mistake" exception to the exclusionary rule in a federal criminal proceeding is in any way dependent on state rules of evidence or is instead solely a matter of federal law.

PARTIES TO THE PROCEEDING

In addition to the parties shown by the caption of this case, Ruben Barrera-Saenz and Adan Montolla Mungia were appellants below and are respondents here.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1982

No.

UNITED STATES OF AMERICA, PETITIONER

v.

VICTOR DOMINGO GARCIA, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-17a) is reported at 676 F.2d 1086. The ruling of the district court denying respondents' motion to suppress evidence (App. D, *infra*, 20a-22a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 28, 1982 (App. B, *infra*, 18a). A petition for rehearing was denied on December 20, 1982 (App. C, *infra*, 19a). On February 9, 1983, Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including March 20, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, respondent Mungia was convicted of possessing marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and respondents Garcia and Barrera-Saenz were convicted of conspiring to commit that offense, in violation of 21 U.S.C. 846.[1] The evidence at trial showed that respondent Mungia transported some 2,073 pounds of marijuana and that respondents Garcia and Barrera-Saenz participated in a conspiracy to further the distribution of the marijuana. The scheme was thwarted when two Texas game wardens discovered respondents' activities. Respondent Garcia was sentenced to eight years' imprisonment. Respondent Mungia was sentenced to five years' imprisonment, to be followed by a three-year special parole term. Respondent Barrera-Saenz was sentenced to five years' imprisonment, all but six months of which were suspended in favor of probation. The court of appeals reversed the convictions (App. A, *infra*, 1a-17a).

1. The evidence showed that on the evening of October 17, 1980, Texas game wardens Christopher Huff and Hilario Saenz established an observation post on a hill approximately 12.8 miles north of Rio Grande City, Texas, and some 100 yards west of Highway 3167 (Tr. 61, 199).[2] The wardens frequently used this observation post to patrol for game violations (Tr. 61-62).

---

[1] Respondents Garcia and Barrera-Saenz were acquitted on the substantive offense, while respondent Mungia was acquitted on the conspiracy count. A fourth co-defendant, Jose Angel Garza-Soliz, fled the scene of the arrest and has not been apprehended.

[2] "Tr." refers to the consecutively-paginated transcript of the suppression hearing and trial contained in Volumes II-VIII of the record on appeal.

At approximately 10:15 p.m., the officers heard a loud, banging noise and the sound of an engine in the area south of their lookout point (Tr. 62, 205, 403). Looking through his binoculars, Officer Huff saw a large, white vehicle driving through a pasture (Tr. 63). The vehicle was driving without any lights (Tr. 63, 65, 207). Huff gave his binoculars to Officer Saenz, who also observed a large truck without lights moving through a pasture (Tr. 403-404). When the truck reached Highway 3167, its headlights were turned on. It then headed north on Highway 3167 (Tr. 64, 208, 405).

Officer Huff thought it was unusual to see a large truck driving without lights in a pasture (Tr. 72), particularly because he knew from personal knowledge that the dirt road on which the truck was travelling was hazardous (Tr. 140).[3] In addition, Officer Huff's suspicions were aroused because he recently had participated in the recovery of a stolen tractor-trailer in the same general area (Tr. 105, 143). Finally, only two days before the events in question, a Customs Patrol Officer had asked Officer Huff to be on the lookout for large trucks because of their use in the transportation of illicit drugs (Tr. 106, 142-143).

With this background knowledge, Officer Huff suggested to his fellow officer that the truck might be stolen or that it might contain a load of marijuana (Tr. 72, 208). Accordingly, the two officers pursued the truck; they eventually stopped it about one-half mile north of their observation post (Tr. 73, 209). The vehicle was an 18-wheel diesel truck with a tanker-trailer of the type usually used for carrying oil or gasoline (Tr. 74-75, 210). Huff knew that there were no oil wells on the property from which the tanker had emerged (Tr.

---

[3] Indeed, later during the night of the events in question, Officer Huff had to help pull a Customs Patrol Officer's vehicle out of a ditch on the same road (Tr. 140).

152-153). The officers approached the cab of the tanker, and respondent Mungia, the sole occupant, stepped out. Officer Huff identified himself and asked Mungia for identification. Mungia produced a driver's license and, in response to a question from Huff, said that he had come from a ranch "down below there" and was looking for the Las Escobas Ranch (Tr. 75-77, 210-212, 407). Mungia became very nervous; his hands were trembling (Tr. 78, 212). When Huff asked Mungia what company employed him and who owned the tanker, Mungia said only that the tanker belonged to "some gringo" for whom Mungia worked but whom he could not identify (Tr. 78, 154, 212-213, 408-409). Huff then said he was going to search the tanker; Mungia told him to "go ahead" (Tr. 78, 154-155, 213).

Huff climbed onto the trailer. He found marijuana residue around the opening of the tank, and when he opened the lid, he encountered a strong smell of marijuana. He then shined his flashlight into the interior of the tanker, where he saw many sacks of a substance that appeared to be marijuana (Tr. 79-80, 213-216). After climbing down from the trailer, Huff advised Mungia that he was under arrest for possession of marijuana (Tr. 80, 216). Leaving Officer Saenz to watch the tanker, Huff handcuffed Mungia, placed him in the patrol car and drove back to the point where the tanker had entered Highway 3167 from the dirt road. Huff parked his patrol car there on the shoulder, with all lights off (Tr. 81-82, 216-217, 220-223).

Within approximately five minutes, a beige Chevrolet pickup truck came down the same dirt road, again without lights. Huff first saw it when it was about 20 yards away from his patrol car. When the pickup reached his position, Huff turned on his headlights and red lights; the pickup stopped (Tr. 85-87, 223-225). Huff left his patrol car and approached the pickup. Three men were in the cab; Huff recognized the driver as re-

spondent Garcia. As he approached, Huff saw the man on the passenger side—co-defendant Garza-Soliz—reach down toward the floor. Huff was unsure whether Garza-Soliz was trying to conceal something or was reaching for a weapon (Tr. 87-89, 93, 227-230). Accordingly, Huff directed the three men to leave the pickup and place their hands on the driver's side of the truck. Garcia, Garza-Soliz, and respondent Barrera-Saenz—the third man—complied with Huff's request. Huff then patted them down for weapons. In Garcia's back pocket, Huff felt a metallic object that turned out to be a loaded ammunition clip for a .45 caliber pistol. Garcia advised Huff that he had a pistol in the cab of the pickup (Tr. 89-92, 229, 231-233). Huff used his one remaining set of handcuffs to handcuff Garcia and Barrera-Saenz together. Garza-Soliz, from whose boot Huff removed a bag of marijuana, stood alongside the other two (Tr. 93-95, 233-234, 240).

Officer Huff then went around the pickup to the passenger side to search for Garcia's weapon. As he did so, Huff noticed the odor of marijuana and saw marijuana residue in the bed of the pickup (Tr. 95, 237). He also found a Colt .45 caliber pistol under the seat on the floor on the passenger side (Tr. 96, 236-237). Huff then returned to his patrol car to radio the Starr County Sheriff's Department for assistance. As he did so, co-defendant Garza-Soliz fled into the brush (Tr. 97, 240, 245).

Approximately 15 minutes later, two sheriff's deputies arrived. Huff left respondents with one deputy; Huff and the other deputy followed the tracks of the 18-wheel tanker on the road into the pasture (Tr. 98, 247-250). Deep in the pasture, in the middle of the road, they found a white 1980 GMC pickup with a flat tire; the officers later determined that the pickup was registered to respondent Garcia's brother. Marijuana residue and footprints were visible around the pickup, and

the tracks of the 18-wheeler ended near the pickup's location (Tr.100-102, 250-253, 256, 258-259). The tanker's tracks formed a sort of "Y" around the pickup, as if the tanker had turned around at that location (Tr. 252-253, 264, 469-471, 473, 579-581).

In the meantime, several Customs Patrol officers arrived at the scene. After Huff briefed them, they too went into the pasture to examine the tanker tracks and the pickup (Tr. 265-266, 268, 273-275, 626-627). Their examination of the white pickup revealed marijuana residue on the truck bed, bumper, and left rear tire (Tr. 428-429, 628-629, 673). Samples of the residue from both pickup trucks were taken the next morning (Tr. 750-752). The tanker truck yielded 2,073 pounds of marijuana (Tr. 749).[4]

2. Prior to trial, respondents unsuccessfully moved to suppress the evidence of marijuana on the ground that, under Texas law, game wardens lack authority to make arrests for non-game violations, that the arrests were therefore illegal, and that the marijuana should be suppressed as the evidentiary fruits of the illegal arrests. Respondents also argued that the game wardens lacked reasonable suspicion to stop the tanker or probable cause to search the tanker and to arrest respondents Garcia and Barrera-Saenz.

At the pretrial hearing on the suppression motion and at trial, Officer Huff consistently testified that he was a certified peace officer (Tr. 60, 132-133, 150-151, 197). The government also called as a witness the regional director of law enforcement of the Texas Department of Parks and Wildlife; he would have testified to his belief that game wardens have the powers of peace officers under Texas law. But before that witness could

---

[4] A chemist from the Drug Enforcement Administration testified that after this amount was cleaned of seeds and stems, it still would yield 1.8 million cigarettes at two cigarettes per gram (Tr. 802-803).

so testify, the district court held that Huff had authority under applicable Texas statutes to arrest respondents (Tr. 157-158). The district court further held that the stop of the tanker was justified by reasonable suspicion and that the game wardens had probable cause to search the tanker and to arrest respondents (App. D, *infra*, 20a-22a).

3. The court of appeals reversed, holding that the marijuana should have been suppressed (App. A, *infra*, 16a-17a). The court began its analysis with the proposition that the legality of respondent's arrests by state officers is governed by state law (*id.* at 4a-5a). It then determined that the arrests were illegal because, under Texas law, game wardens lack "cosmic arresting authority" (*id.* at 14a). Although article 2.12(11) of the Texas Criminal Procedure Code Annotated (Vernon 1977) includes game wardens within its definition of peace officers, and article 2.13 authorizes a peace officer to make warrantless arrests "where * * * authorized by law," the court concluded that the Texas Parks and Wildlife Code limits a game warden's arrest powers either to offenses committed in state parks or to violations of game laws (App. A, *infra*, 7a-8a, 13a). The court rejected the government's argument that article 14.03 of the Texas Criminal Procedure Code Annotated, which grants any peace officer the power to make warrantless arrests on probable cause, applies to game wardens despite the limitations of the Parks and Wildlife Code (App. A, *infra*, 12a-13a). Because the arrests in this case neither took place in a state park nor were for violations of a game law, the court held that the arrests were invalid and that the marijuana evidence should have been suppressed as the fruit of the arrests (*id.* at 14a-16a). Finally, the court ruled that the "good-faith" exception to the exclusionary rule (see *United States* v. *Williams*, 622 F.2d 830, 840-847 (5th Cir. 1980) (en banc), cert. denied, 449 U.S. 1127 (1981))

was not applicable in this federal prosecution because the Texas courts do not recognize such an exception (App. A, *infra*, 16a-17a). Accordingly, the court reversed the convictions (*id.* at 17a).[5]

4. The government petitioned for rehearing. First, the government pointed out that after the court of appeals' decision in this case, a panel of the Texas Court of Criminal Appeals expressly held that game wardens possess the general arrest powers accorded to any peace officer under articles 2.13 and 14.03 of the Texas Criminal Procedure Code Annotated. *Christopher* v. *State*, 639 S.W.2d 932 (Tex. Crim. App. 1982).[6] Accordingly, the government argued that it would be appropriate for the court of appeals to reconsider its opinion and to defer to the *Christopher* court's determination on this issue of state law. Further, the government argued that any technical illegality in the game wardens' actions under state law should not preclude admission of the marijuana evidence in this federal prosecution because there was no indication that the game wardens' actions violated federal constitutional standards and because the game wardens acted in the reasonable belief that they possessed general arrest authority under Texas law. Relying principally on *Elkins* v. *United States*, 364 U.S. 206 (1960), the government contended that the court of appeals erred in applying

---

[5] Because it rested its judgment on the conclusion that the arrests exceeded the officers' authority under state law, the court of appeals did not review the district court's determination (App. D, *infra*, 20a-22a) that the arrests were supported by probable cause (App. A, *infra*, 17a n.27). The court also declined to review the challenge to the sufficiency of the evidence mounted by respondents Garcia and Barrera-Saenz (*ibid.*).

[6] In *Christopher*, the defendant was stopped by a game warden who had observed him driving in excess of the speed limit. As the warden approached the vehicle, he smelled marijuana. Marijuana was later found in defendant's vehicle, and he was convicted of possession of that drug (639 S.W.2d at 933-934).

state rather than federal law to determine whether to invoke the exclusionary rule.

The court of appeals announced that it would defer any ruling on the government's rehearing petition after learning that the Texas Court of Criminal Appeals had granted a petition for rehearing en banc in *Christopher* v. *State*, *supra*. On rehearing, the state court again affirmed Christopher's conviction for possession of marijuana (see page 8 note 6, *supra*), but it modified its ruling on the scope of game wardens' general arrest powers. Relying on Tex. Rev. Civ. Stat. Ann. art. 6701d § 153 (Vernon 1977), the court held that game wardens are authorized to make warrantless arrests for violations of state traffic laws (whether or not the traffic violations occur in state parks or in connection with game law violations), but it rejected the panel's conclusion that game wardens possess the full arrest powers of any Texas peace officer (639 S.W.2d at 937).

Thereafter, the court of appeals denied the government's rehearing petition in this case (App. C, *infra*, 19a), citing the en banc decision in *Christopher*. The court did not address the government's alternative grounds for rehearing.[7]

REASONS FOR GRANTING THE PETITION

The court of appeals has extended the reach of the Fourth Amendment exclusionary rule far beyond its intended scope. The court did not rule, nor could it have ruled on this record, that the game wardens violated the Fourth Amendment or any federal statute or rule.

---

[7] On January 11, 1983, the government moved for dismissal of the indictment against respondents, and that motion was granted by the district court on January 12, 1983. For the reasons set forth in our supplemental brief in *United States* v. *Villamonte-Marquez*, No. 81-1350 (filed Mar. 15, 1983), we do not believe this action affects this Court's jurisdiction. We are furnishing respondents' counsel a copy of our supplemental brief in *Villamonte-Marquez*.

And the state law that was violated was not one intended to safeguard the Fourth Amendment or related privacy interests. Instead, the state law was a purely technical one designed to allocate arrest powers among various state officials; it was not intended to protect the rights of suspiciously-behaving citizens. This Court has never held that the exclusionary rule is applicable to violations of such idiosyncratic state laws.

The court of appeals also erred in failing to apply its own good-faith exception to the exclusionary rule in this case. Clearly, the arresting officers, even if mistaken, did not act unreasonably in thinking that they possessed the full arrest powers of any Texas peace officer; the district court and a panel of the Texas Court of Criminal Appeals so held. The game wardens could not reasonably have been expected to anticipate the contrary result ultimately reached by a panel of the Fifth Circuit; and clearly they could not have predicted the result reached by the state court sitting en banc, which grants them full arrest powers for drug offenses discovered in the course of traffic violations but not otherwise.

Finally, the court seriously erred in looking to state evidentiary rules to determine the applicability of the exclusionary rule. The admissibility of evidence in federal criminal proceedings is governed by federal law, including the Federal Rules of Evidence, not by state law.

The result of the court's decision is an unjustified extension of the exclusionary rule that is compounded by confusion as to the applicable rules of evidence. In light of the importance to our system of criminal justice of the proper application of the exclusionary rule, this Court's review is warranted.

1. The court of appeals did not hold, or even suggest, that the stop of the tanker driven by respondent Mungia, although perhaps illegal under state law, in

any way violated the Fourth Amendment or any federal law.[8] Instead, the court summarily concluded (App. A, *infra*, 16a), without citation of authority, as follows:

---

[8] One of the many anomalies in the court of appeals' decision is its strict focus on the legality of the arrests in this case when, in fact, the arrests were completely irrelevant to the seizure of the marijuana evidence. As we have set forth above (see pages 3-4, *supra*), Officer Huff searched the tanker driven by respondent Mungia *before* making the arrest; in the case of the other respondents, no search was required because marijuana residue was in plain view in the bed of their pickup truck. For purposes of this case, however, we may assume that if Officer Huff lacked authority under state law to make arrests outside of state parks for non-game law violations, he likewise lacked authority under state law to stop vehicles outside of state parks on suspicion of such violations. Accordingly, we presume that the court of appeals would have reached the same result had it focused on the stop of the tanker truck, which was the critical event in this case.

Nevertheless, it is important to point out that this Court has never ruled on the question whether state or federal law governs the validity of investigative stops. Although the Court has held that searches are tested by federal law (*Elkins* v. *United States*, 364 U.S. 206, 217 (1960)), and that warrantless arrests are tested by state law in the absence of a controlling federal statute (*United States* v. *Di Re*, 332 U.S. 581, 589 (1948)), an investigative stop does not clearly fall within either category. An investigative stop may lead to a search (and hence the *Elkins* line of cases), or to an arrest (and hence the *Di Re* line of cases), or, as in the present case, to both a search and an arrest (and hence an uncertain result). In our view, the facts of this case point out the need for a uniform federal rule in all circumstances (see pages 17-18 note 14, *infra*).

In any event, it is worth noting that no illegal arrests occurred in this case, even under state law. By the time Officer Huff arrested respondent Mungia, he could have made a lawful citizen's arrest under article 14.01(a) of the Texas Criminal Procedure Code Annotated because he knew that a felony (possession of marijuana) was being committed in his presence. His knowledge came from his search of the tanker, the validity of which turns on federal law (*Elkins*, *supra*). Similarly, it appears that Huff, even acting as a game warden, could have arrested Garcia, Barrera-Saenz and Garza-Soliz for a traffic viola-

> Having found that defendants were illegally arrested, it follows that the evidentiary fruits of those unlawful arrests should not have been introduced at defendants' trial.

Contrary to the court of appeals' unsupported assertion that suppression was required in these circumstances, we submit that the court was required first to consider the nature of the state illegality. If, as here, the violation of state law was not of constitutional magnitude, then neither the Fourth Amendment nor any federal statute confers authority on the federal courts to suppress evidence obtained in violation of a purely technical state law.[9]

a. Since *Weeks* v. *United States*, 232 U.S. 383 (1914), it has been clear that the exclusionary rule is a judicial response to "direct violation of the *constitutional* rights of the defendant" (*id.* at 398; emphasis added). See, *e.g.*, *Stone* v. *Powell*, 428 U.S. 465, 482 (1976)

---

tion (see *Christopher* v. *State*, *supra*) because he observed their pickup truck driving on a public highway at night without any lights. Alternatively, Huff could have made a legitimate citizen's arrest because he observed marijuana residue in plain view in the bed of the pickup truck. These points, which the government did not assert below and which are not independently worthy of this Court's review, are noted here only to demonstrate the incongruous result reached by the court of appeals.

[9] We note preliminarily that the court of appeals did not hold that *any* arrest that violates state law is itself a violation of the Fourth Amendment; on the contrary, the court expressly disavowed making any constitutional ruling (App. A, *infra*, 5a n.6). This is in accord with the views expressed by Professor LaFave (1 W. LaFave, *Search and Seizure, A Treatise on the Fourth Amendment* § 1.3, at 51-52 (1978), quoting Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 Duke L.J. 319, 328):

> [U]nquestionably there is no constitutional requirement that evidence obtained in another jurisdiction be suppressed merely because the process of acquisition offended some local law. The argument that 'local rules * * * will have constitutional sanction, for whatever action is illegal is perforce unreasonable,' has not prevailed.

(emphasis added) ("[t]he exclusionary rule was a judicially created means of effectuating the rights secured by the *Fourth Amendment*"); *United States* v. *Calandra*, 414 U.S. 338, 348 (1974) (emphasis added) ("the rule is a judicially created remedy designed to safeguard *Fourth Amendment rights* * * *"); *Elkins* v. *United States*, 364 U.S. 206, 217 (1960) (emphasis added) (the purpose of the rule is "to compel respect for the *constitutional* guaranty * * *"). See also *United States* v. *Caceres*, 440 U.S. 741 (1979) (refusing to exclude evidence obtained as a result of electronic recording in violation of government regulations but not in violation of defendant's constitutional rights); *United States* v. *Hensel*, No. 81-1538 (1st Cir. Jan. 25, 1983), slip op. 27 ("The exclusionary rule was not fashioned to vindicate a broad, general right to be free of agency action not 'authorized' by law, but rather to protect certain specific, constitutionally protected rights of individuals").[10]

Indeed, despite the exclusionary rule's broad purpose of deterring constitutional violations, this Court has recognized that application of the rule "deflects the truthfinding process and often frees the guilty." *Stone* v. *Powell*, *supra*, 428 U.S. at 490. Accordingly, the Court has substituted for automatic exclusion of evidence seized in violation of Fourth Amendment rights a balancing test in which deterrence of official misconduct is weighed against the substantial cost to society of excluding probative evidence. See, *e.g.*, *United States* v. *Janis*, 428 U.S. 433 (1976); *United States* v. *Calandra*, *supra*, 414 U.S. at 349-352; *Alderman* v. *United*

---

[10] We recognize, of course, that Congress may provide for the suppression of evidence even when there has been no constitutional violation. See, *e.g.*, 18 U.S.C. 2515 (fruits of unlawful wiretap not admissible). But there is no federal statute or rule relevant to this case, and thus the focus must be on constitutional considerations.

States, 394 U.S. 165, 175 (1969). These cases hold that invocation of the exclusionary rule may be inappropriate even when actual violations of the Fourth Amendment have occurred; it follows *a fortiori* that imposition of that drastic remedy is wholly disproportionate to the purpose for which it was apparently used here, *viz.*, the enforcement of a state's statutory provisions circumscribing the arrest powers of game wardens. Accordingly, Officer Huff's stop of respondents did not call for invocation of the exclusionary rule because, as the district court held (App. D, *infra*, 20a-22a), the officer's actions were fully consistent with Fourth Amendment requirements and did not otherwise violate the Constitution.

b. Under the Fourth Amendment, an investigative stop, such as the stop of the tanker truck in this case, need be grounded only on reasonable suspicion. See *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 884 (1975). In the present case, the game wardens had a reasonable suspicion that criminal activity was afoot based on respondent Mungia's highly unusual activity of driving a large tanker at night without lights on a very poor ranch road near the border, coupled with Officer Huff's own knowledge of previous criminal activity involving a stolen tanker in the same general area and another officer's directive to watch for large trucks of the type driven by Mungia because of their use in marijuana smuggling in the area (Tr. 72, 105-106, 138-143). This information then ripened into probable cause to believe that the tanker contained contraband, justifying the search of the tanker, when respondent Mungia was unable to answer or gave evasive answers to certain very elementary questions concerning the place of origin of his trip, the identity of his employer, and the owner of the tanker (Tr. 75-78, 154; see also Tr. 212-213, 408-409). The discovery of marijuana in the tanker clearly justified Mungia's arrest, as well as the

stop and arrest of respondents Garcia and Barrera-Saenz when, moments later, they were observed in an unlighted pickup truck leaving the same pasture from which Mungia had emerged (Tr. 85-87; see also Tr. 223-225). The fact that the game wardens lacked authority under Texas law to take these actions did not implicate respondents' Fourth Amendment rights because the Fourth Amendment simply does not address the question of which government officers may make a search or seizure in a particular situation; instead, the Fourth Amendment requires only that the governmental intrusion be supported by reasonable suspicion or probable cause, depending on its nature.[11]

c. This distinction, for exclusionary rule purposes, between constitutional and nonconstitutional error has been widely recognized by the federal courts of appeals in the context of cases arising out of violations of Fed. R. Crim. P. 41, governing the issuance and execution of search warrants. These cases hold that, as a general principle, a violation of the requirements of Rule 41 does not warrant suppression of evidence unless the violation renders the search unconstitutional under tradi-

---

[11] Compare *United States* v. *Soto-Soto*, 598 F.2d 545 (9th Cir. 1979), in which the court of appeals held that an FBI agent's lack of statutory authority to conduct border searches rendered the search in question subject to normal Fourth Amendment standards rather than the special rules applicable to border searches; the court then ordered suppression of the evidence because the agent had neither reasonable suspicion nor probable cause for the stop and search in question. In a subsequent case, the Ninth Circuit made it clear that the evidence in *Soto-Soto* was suppressed not merely because the agent acted in excess of his statutory authority but because the search was found to have been unconstitutional. *United States* v. *Harrington*, 681 F.2d 612, 615 (1982). See also *United States* v. *Vasser*, 648 F.2d 507, 511 n.3 (9th Cir. 1980), cert. denied, 450 U.S. 928 (1981); *United States* v. *Johnson*, 641 F.2d 652, 659 n.5 (9th Cir. 1980).

tional Fourth Amendment standards. See, *e.g.*, *United States* v. *Harrington*, 681 F.2d 612, 615 (9th Cir. 1982); *United States* v. *Vasser*, 648 F.2d 507, 510 (9th Cir. 1980), cert. denied, 450 U.S. 928 (1981); *United States* v. *Pennington*, 635 F.2d 1387, 1390 (10th Cir. 1980), cert. denied, 451 U.S. 938 (1981); *United States* v. *Gitcho*, 601 F.2d 369, 372 (8th Cir. 1979); *United States* v. *Dudek*, 530 F.2d 684, 689 (6th Cir. 1976); *United States* v. *Burke*, 517 F.2d 377, 386 (2d Cir. 1975).[12] As the court stated in *United States* v. *Burke*, *supra*, 517 F.2d at 386, quoting *United States* v. *Dunnings*, 425 F.2d 836, 840 (2d Cir. 1969), cert. denied, 397 U.S. 1002 (1970), the exclusionary rule is "'a blunt instrument, conferring an altogether disproportionate reward not so much in the interest of the defendant as in that of society at large.' For that reason courts should be wary in extending the exclusionary rule * * * to violations which are not of constitutional magnitude."[13]

---

[12] These cases acknowledge an exception to this general rule only in the rare instance in which the defendant is prejudiced by the nonconstitutional violation or the violation is committed in deliberate disregard of Rule 41, Fed. R. Crim. P. Such an exception could not possibly apply here. Respondents were not prejudiced simply because they were stopped by one type of state officer instead of another. As we have shown, the officers' conduct fully comported with constitutional requirements. Nor is there any suggestion in this case of intentional misconduct on the part of the game wardens. Officer Huff repeatedly testified that he believed that he was a certified peace officer under Texas law (Tr. 60, 132-133, 150-151, 197), and this belief, as we will presently show (see pages 19-21, *infra*), was entirely reasonable at the time of the events in question.

[13] The distinction, for purposes of the exclusionary rule, between "unconstitutional" actions and "illegal" actions is implicit in *Elkins* v. *United States*, *supra*, 364 U.S. at 224, and was expressly recognized by Justice Frankfurter in his dissent in that case, in which he objected strenuously to the majority's distinction between the "'unconstitutionality' of police conduct, as dis-

d. The court of appeals felt bound to follow this Court's decision in *United States* v. *Di Re*, 332 U.S. 581, 589 (1948), in which the Court held that in the absence of a controlling federal statute, the validity of a warrantless arrest is to be determined according to the law of the state in which the arrest took place. See also *United States* v. *Watson*, 423 U.S. 411, 420 n.8 (1976); *Ker* v. *California*, 374 U.S. 23, 37 (1963); *Miller* v. *United States*, 357 U.S. 301 (1958); *Johnson* v. *United States*, 333 U.S. 10, 15 n.5 (1948). Apart from the question of *Di Re*'s continuing vitality,[14] we note that the

---

tinguished from its mere illegality under state or federal law" (*id.* at 243).

[14] The Court has never explained the dichotomy between *Elkins* v. *United States*, *supra*, which holds that the validity of searches and seizures is to be tested by federal law, "neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed" (364 U.S. at 224), and *United States* v. *Di Re*, *supra*, which holds that, absent a controlling federal statute, the validity of a warrantless arrest is determined according to the law of the state in which the arrest occurred (332 U.S. at 589). In *Di Re*, the Court relied in part on the absence of "any general federal law of arrest" (*id.* at 590). But there is likewise no general federal law of search and seizure except that which this Court has created. Reasoning from cases such as *Terry* v. *Ohio*, 392 U.S. 1 (1968), at least one court has concluded that this Court has, subsequent to *Di Re*, effectively created general federal law governing arrests and that *Elkins* implicitly overruled *Di Re*. *United States* v. *Miller*, 452 F.2d 731, 733 (10th Cir. 1971), cert. denied, 407 U.S. 926 (1972); *United States* v. *Alberty*, 448 F.2d 706 (10th Cir. 1971). The view that federal law governs the validity of state arrests for purposes of federal trials has recently beeen endorsed by the Sixth Circuit. *United States* v. *Porter*, No. 81-5617 (Mar. 10, 1983), slip op. 13.

In any event, it is apparent from cases such as the instant one that the *Di Re* rule produces anomalous results. There is no logic to the proposition that the outcome of a federal criminal prosecution should turn on technical idiosyncracies peculiar to the state in which the law enforcement activity occurred. It thus

state statute in that case was significantly different from the one involved here. The requirement that warrantless misdemeanor arrests be made only for offenses committed in the presence of the arresting officer (332 U.S. at 591), while not constitutionally mandated, clearly implicates substantial individual liberty interests; the Texas statutory provisions circumscribing the arrest powers of game wardens do not.[15]

In our view, it is clearly inappropriate for a federal court to order suppression to enforce a state statutory provision that does not implicate constitutional rights or protect substantial individual privacy or liberty interests. There is no compelling federal interest in enforcement of the Texas provisions governing the arrest powers of game wardens sufficient to justify suppression of the highly probative evidence seized here and the consequent reversal of respondents' criminal convictions. It is true that in rejecting the "silver platter" doctrine in *Elkins* this Court relied in part on the frustration of state policy that would result if federal courts admitted evidence that would not have been admissible in a state court (364 U.S. at 221-222). But the Court in *Elkins* clearly had in mind state search and seizure rules of constitutional magnitude that were congruent with federal standards (*ibid.*), and neither the policy nor the logic of that decision extends to cases involving technical, nonconstitutional state requirements that

---

might be appropriate for the Court to reconsider *Di Re* and its progeny. Such reconsideration is not essential in this case, however, because, as we demonstrate in text, even *Di Re* cannot support the result reached by the court of appeals.

[15] The same distinction is apparent in other cases following *Di Re*. See, *e.g.*, *Ker* v. *California*, *supra*, 374 U.S. at 37-38 (state "knock-and-announce" rule); *Miller* v. *United States*, *supra*, 357 U.S. at 306 (same); *Johnson* v. *United States*, 333 U.S. at 15 & n.5 (state rule permitting warrantless felony arrests only upon "reasonable cause" to believe the defendant guilty).

have no counterpart in federal law. Here, by their observable conduct, respondents rendered themselves subject to stop, and eventually arrest, by any duly authorized state or federal official. It was wholly fortuitous, and wholly immaterial in terms of their expectations of freedom from official intrusion, that the particular officers who observed them lacked full police powers. The only law that was violated by the officers was one intended to allocate governmental powers among various officials, rather than one intended to protect the rights of citizens engaging in suspicious behavior. Accordingly, the court's invocation of the exclusionary rule was erroneous.

2. Even assuming that the exclusionary rule may sometimes be invoked for violation of a state law that does not embody constitutional requirements, the rule should not have been applied in this case. At the time of the events in question, the Texas courts had not settled the scope of a game warden's arrest powers. At the suppression hearing, Officer Huff consistently testified that he was a certified peace officer (Tr. 60, 132-133, 150-151, 197) who, under article 14.03 of the Texas Criminal Procedure Code Annotated, would be authorized to make warrantless arrests on probable cause. Moreover, the government offered as a witness the regional director of law enforcement of the Texas Department of Parks and Wildlife; this witness would have testified that game wardens have the full powers of peace officers under Texas law. But the district court ruled that this witness's testimony was unnecessary because the court's own examination of the relevant Texas statutes had convinced it that game wardens had general arrest powers (Tr. 157-159). And, as previously noted, a panel of the Texas Court of Criminal Appeals subsequently reached the same conclusion. *Christopher* v. *State*, *supra*, 639 S.W.2d at 934-935.

That a panel of the Fifth Circuit and the Texas Court of Criminal Appeals sitting en banc later reached a different conclusion in no way detracts from the fact that at all relevant times Officer Huff (as well as his superior at the Texas Department of Parks and Wildlife) reasonably believed that he had all the powers of a Texas peace officer. Accordingly, the "good-faith" or "reasonable mistake" exception to the exclusionary rule adopted by the Fifth Circuit in *United States* v. *Williams*, 622 F.2d 830, 840-847 (1980) (en banc), cert. denied, 449 U.S. 1127 (1981), should have been applied here.

The similarity between this case and *Williams* is striking. In *Williams*, a federal agent who had previously arrested Williams in Ohio for a narcotics violation encountered her in another state. The agent knew that a condition of Williams' release on bond pending appeal was that she remain in Ohio. Accordingly, the agent arrested Williams for violating this condition and, in ensuing searches incident to the arrest, seized heroin from Williams' possession.

Sitting en banc, the Fifth Circuit held unanimously that the district court should not have suppressed the heroin. One majority of the court held that the federal agent had legal authority to arrest Williams because, by violating a condition of her bail release, she had committed the crime of contempt of court in the agent's presence (622 F.2d at 836-839). A different, overlapping majority of the court held that, irrespective of the validity of Williams' arrest, the heroin should not have been suppressed because the agent had acted in good faith in arresting and searching Williams and could not reasonably be expected to have known that there was any serious doubt concerning his authority to make the arrest. Because the purpose of the exclusionary rule is to deter "willful or flagrant actions by police, not reasonable, good-faith ones" (622 F.2d at 840), the court concluded that it made no sense to suppress evidence in

these circumstances. Here, too, there can be no doubt that Officer Huff acted reasonably, as evidenced by the fact that the district court and a panel of the Texas Court of Criminal Appeals upheld the general arrest powers of game wardens. Under these circumstances, application of the exclusionary rule is wholly unjustified.

This issue is similar to that presently under advisement following the reargument in *Illinois* v. *Gates*, No. 81-430 (reargued Mar. 1, 1983). If the Court reaches and decides the exclusionary rule issue in *Gates*, however, its decision will not necessarily control the disposition of this case, because *Gates* involves the special situation presented by a search conducted pursuant to a warrant. It thus seems entirely possible that this case will afford a suitable vehicle to consider important issues that may remain unsettled after *Gates*.[16]

3. Finally, the court of appeals seriously erred in looking to state law to determine the applicability of the exclusionary rule. Even accepting the propriety of analyzing the legality of the arrests under state law (see pages 17-18 note 14, *supra*), the court of appeals cited no authority, and we know of none, for the proposition that state rules of evidence govern federal criminal prosecutions. On the contrary, federal courts are bound to apply the Federal Rules of Evidence in proceedings before them. See Fed. R. Evid. 1101. Thus, Rule 402 of the Federal Rules of Evidence, rather than the evidentiary rules of the State of Texas, governs this proceed-

[16] We have presented our arguments in support of a "reasonable mistake" exception to the exclusionary rule in *Gates* and need not repeat them here. We are furnishing respondents' counsel with copies of our brief in *Gates* (Supplemental Brief for the United States as Amicus Curiae Supporting Reversal (filed Jan. 13, 1983)), in which those arguments are set forth.

ing.[17] Rule 402 provides for the admission of all relevant evidence, "except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority." None of the exceptions is applicable here; neither the federal Constitution nor any federal statute or rule calls for the exclusion of evidence obtained in violation of a purely technical state law.

Contrary to the court of appeals' assertion (App. A, *infra*, 17a), application of a "reasonable mistake" exception to the exclusionary rule in this case would not have the effect of "engraft[ing] a 'good faith' exception onto Texas jurisprudence." The courts of Texas remain free to admit or exclude evidence in their own proceedings as they see fit, but the rules of procedure utilized in federal criminal trials should in no way depend on the idiosyncracies of state law. This is clear from the Senate Report accompanying the adoption of the Federal Rules of Evidence. The report (S. Rep. No. 93-1277, 93d Cong., 2d Sess. 8 (1974)) observed:

> [T]here is a real need for a comprehensive code of evidence intended to govern the admissibility of proof in all trials before the Federal courts because of the lack of uniformity and clarity in the present law of evidence on the Federal level.

---

[17] Texas' exclusionary rule (Texas Criminal Procedure Code Ann. art. 38.23 (Vernon 1979)) is contained in the chapter of the Code entitled "Evidence in Criminal Actions." Thus, Texas' exclusionary rule is as much a rule of evidence as is the federal exclusionary rule developed by this Court.

The unprecedented approach taken by the court of appeals in this case is thus flatly inconsistent with Congress' purpose in enacting the Federal Rules of Evidence.[18]

---

[18] Prior to the adoption of Rule 402, this Court had held that its supervisory power over the administration of justice in the federal courts enabled it to fashion rules governing the admissibility of evidence in federal criminal trials, whether or not such rules were constitutionally required. *McNabb* v. *United States*, 318 U.S. 332, 341 (1943). But it is doubtful whether the *McNabb* rule survived the passage of the Federal Rules of Evidence. In enacting those rules, Congress specifically addressed the question of this Court's authority to make amendments; in discussing Rule 402, the House Report explained (H.R. Rep. No. 93-650, 93d Cong., 1st Sess. 7 (1973)):

> Rule 402 as submitted to the Congress contained the phrase "or by other rules adopted by the Supreme Court". To accommodate the view that the Congress should not appear to acquiesce in the Court's judgment that it has authority under the existing Rules Enabling Acts to promulgate Rules of Evidence, the Committee amended the above phrase to read "or by other rules prescribed by the Supreme Court pursuant to statutory authority" in this and other Rules where the reference appears.

At the same time, Congress enacted 28 U.S.C. 2076, which increased the role of Congress in the evidence rulemaking process. See. H.R. Rep. No. 93-650, *supra*, at 18. Thus, we believe that the "supervisory power" relied on in *McNabb* no longer furnishes sufficient authority for a federal court to modify Rule 402's requirement that all relevant evidence be admitted, subject only to the listed exceptions. Because the "evidentiary rule" adopted by the Fifth Circuit in this case does not fit within Rule 402's exceptions, it could be enforced only if enacted in conformity with the procedures established in 28 U.S.C. 2076.

In any event, this case is clearly an inappropriate vehicle for the exercise of a federal court's "supervisory power" to order suppression. The law enforcement techniques condemned in *McNabb*, *supra*, 318 U.S. at 334-342, included interrogating the defendants, all of whom were poorly-educated and without counsel, for several days without ever bringing them before a magistrate or judge, as required by statute. No such questionable practices occurred in the instant case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

KATHRYN A. OBERLY
Assistant to the Solicitor General

JOEL M. GERSHOWITZ
Attorney

MARCH 1983

APPENDIX A

UNITED STATES COURTS OF APPEALS, FIFTH CIRCUIT

MAY 28, 1982

No. 81-2115

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

VICTOR DOMINGO GARCIA, RUBEN BARRERA-SAENZ AND ADAN MONTOLLA MUNGIA, DEFENDANTS-APPELLANTS.

Appeals from the United States District Court for the Southern District of Texas.

Before BROWN, GOLDBERG and GEE, Circuit Judges.

GOLDBERG, Circuit Judge:

Adan Mungia, Victor Garcia and Ruben Barrera-Saenz appeal their convictions for the possession of[1] and conspiracy to distribute[2] marijuana. Appellants have challenged the admissibility of evidence discovered incident to a series of warrantless arrests made by a Texas game warden. We find that under Texas law, the game warden's warrantless arrests were illegal and that the district court erred in refusing to exclude the evidentiary fruits of those illegal arrests. Therefore we reverse.

Facts

The arrests in this case occurred on the night of October 17, 1980. That evening, two Texas Parks and Wild-

---

[1] 21 U.S.C § 841(a)(1).

[2] 21 U.S.C. § 846.

life Department employees, Christopher Huff and Hilario Saenz, had positioned themselves on a hill on the Rosa Ranch, near Rio Grande City, Texas. According to game warden Huff's testimony, they were on the lookout for violations of state gaming laws.

Huff testified that, using binoculars to scan the area, he spotted a large truck driving through a pasture on a private ranch road. According to Huff, the truck's lights were off while it was driving on the private road through the pasture, but when the truck turned onto Highway 3167, its headlights were turned on.

Huff testified that he had heard reports of stolen vehicles and drug smuggling in the area, and that he thought the truck he spotted might have been stolen, or carrying a load of marijuana or involved in cattle rustling. Therefore, Huff and Saenz decided to stop the vehicle, an 18-wheeled diesel truck with a tanker-trailer.

The driver of the truck was appellant Adan Mungia. Huff demanded that Mungia produce his driver's license. Mungia complied. According to Huff, Mungia then responded to a series of questions with what the game warden thought to be "evasive" answers. In addition, Huff thought that Mungia appeared to be nervous. Therefore, game warden Huff decided to search the truck. Huff climbed up the tanker-truck's ladder to the top of the tank, where he saw what he thought might be marijuana residue around the tank's entry hatch. When he opened the entry hatch, Huff noticed a strong odor of marijuana. In the interior of the tank were sacks which later turned out to contain marijuana.

Mr. Mungia was then handcuffed and placed in the game wardens' vehicle. Saenz remained with the tanker-truck while Huff and Mungia drove back down Highway 3167 to the spot where it intersected the private ranch road. At this intersection, Huff spotted a beige pickup truck emerge from the ranch road with its

lights turned off. Huff stopped the beige pickup, ordered its three passengers—Victor Garcia, Ruben Barrera-Saenz and Angel Garza Soliz—out of the truck, and handcuffed Garcia and Barrera-Saenz ("Barrera") together. A search of the pickup truck by Huff revealed what appeared to be marijuana residue in its bed. Huff radioed the Starr County Sheriff's Department for assistance. As he did so, Garza-Soliz ran off into the brush.[3]

Two sheriff's deputies arrived. Garcia and Barrera were left in the custody of one deputy, while Huff and the other deputy followed the tracks of the tanker-truck down the private ranch road into the pasture. In the pasture, they found a white pickup truck with a flat tire.[4] Huff testified that he saw marijuana residue in the area around the white pickup. In the meantime, several Customs Patrol officers had arrived. After Huff related the evening's events to them, the Customs Patrol officers also went into the pasture and examined the white pickup truck. The Customs officers testified that they found marijuana residue on the truck bed, bumper and tire.

Defendants were charged with possession of marijuana and with conspiracy to possess marijuana with the intent to distribute it. Each of the three defendants filed pretrial motions to suppress evidence which they

---

[3] Garza-Soliz remains at large.

[4] Both Garcia and Barrera testified at trial, giving the following account of the evening's events: On the afternoon and evening of October 17, 1980 Garcia and Barrera were working together, tending to chores on Garcia's ranch. After work, Garcia was driving Barrera home in the white pickup truck when the truck had a flat tire. The pickup had no spare tire, so both Garcia and Berrera left the truck and began walking. While walking, they spotted the beige pickup truck and flagged it down. The driver of the beige pickup, Garza-Soliz, agreed to give them a ride. Minutes later, Huff stopped the beige pickup containing Garza-Soliz, Garcia and Barrera.

contended had been illegally obtained. At the pretrial suppression hearing, defendants argued *inter alia* that under Texas law, a game warden lacked the authority to make an arrest for a non-gaming law violation, that their arrests were therefore illegal, and that the evidentiary fruits of the illegal arrests should not be admissable at trial.[5] The district court denied the motions to suppress, finding that game warden Huff had authority under applicable Texas statutes to arrest defendants.

The case went to trial before a jury. At the close of the Government's case, and at the close of trial, each of the defendants moved for a Judgment of Acquittal pursuant to Rule 29, Fed. R. Crim. P. The motions were denied. The jury found Mungia guilty of possession of marijuana, but found him not guilty on the conspiracy count. Garcia and Barrera were found guilty of conspiracy to distribute marijuana, but were acquitted on the possession charges.

Defendant Mungia, Garcia and Barrera now appeal, arguing that the trial court erred in denying their motions to suppress. Defendants Garcia and Barrera argue also that the district court erred in denying their motions for Judgment of Acquittal.

Authority to Arrest

The legality of a warrantless arrest, absent a specific federal statute, is determined by state law. *U.S. v. Di Re*, 332 U.S. 581, 589, 68 S.Ct. 222, 226, 92 L.Ed. 210 (1947). The lawfulness of an arrest by state officers for a state offense is determined by state law, so long as that law is not violative of the federal Constitution. *Ker v. State of California*, 374 U.S. 23, 37, 83 S.Ct. 1623, 1631, 10 L.Ed.2d 726 (1963). When state officers arrest

---

[5] It was also argued that there was no reasonable suspicion to justify the stop, nor probable cause for the search, of Mungia's vehicle.

for a federal crime, the legality of the arrest is determined by the law of the state in which the arrest takes place, subject to federal constitutional standards. *E.g.*, *U.S. v. Ible*, 630 F.2d 389, 392-393 (5th Cir. 1980); *U.S. v. Fossler*, 597 F.2d 478, 482 n.3 (5th Cir. 1979); *U.S. v. Lipscomb*, 435 F.2d 795, 798 (5th Cir. 1970), *cert. denied*, 401 U.S. 980, 91 S.Ct. 1213, 38 L.Ed.2d 331 (1971). Therefore, the validity of Texas game warden Huff's warrantless arrests of defendants Mungia, Garcia and Barrera will be analyzed under Texas law.[6]

At the pretrial suppression hearing, and once again on appeal, defendants have argued that outside of state parks, a game warden lacks statutory authority to make an arrest for any offense other than a gaming law violation. The district court overruled defendants' arguments, finding that Huff was a peace officer under Texas Code of Criminal Procedure, article 2.12,[7] and that as a peace officer, Huff had authority to arrest defendants. We must determine whether this is a correct reading of Texas law.

It is true that game wardens may be commissioned as peace officers under article 2.12(11) of the Texas Code of Criminal Procedure. Furthermore, article 2.13 of the Code of Criminal Procedure authorizes a peace officer to "arrest offenders without warrant in every case where he is authorized by law...." However, our analysis of Texas law does not end here. We must go on to examine the statutory provisions dealing specifically with employees of the Parks and Wildlife Department, for in those statutes, we find clear language limiting the law enforcement authority of game wardens. A game warden's warrant does not extend universally. Thus,

---

[6] Courts should not address Constitutional questions unless it is necessary to do so. Therefore, we turn first to the state law questions for resolution of this appeal.

[7] Tex. Code Crim. Proc. Ann. art. 2.12(11) (Vernon 1977).

Texas Parks and Wildlife Code sec. 11.019(b)[8] states that game wardens "have the powers, privileges and immunities of peace officers *while on state parks . . . or in fresh pursuit of those violating the law in a state park. . . .*" (Emphasis added.)[9] The specific authority of game wardens to effect arrests is set forth in Texas Parks and Wildlife Code sec. 12.102. That section permits game wardens "the same authority as a sheriff to arrest . . . *in connection with violations of the laws relating to game, fish, and birds.*" (Emphasis added.)[10] *See also* Texas Parks and Wildlife Code sec. 13.109 (empowering peace officers commissioned under section 11.019 to enforce regulations governing parks and recreation areas);[11] *Opinion of the Attorney General*

---

[8] Tex. Parks & Wild. Code Ann. § 11.019(b) (Vernon 1976).

[9] The full text of section 11.019 is as follows:

§ 11.019. Employees as Peace Officers

(a) The director [of the Parks and Wildlife Department] may commission as peace officers any of the employees provided for in the general appropriations act.

(b) Employees commissioned under this section have the powers, privileges, and immunities of peace officers while on state parks or on state historical sites or in fresh pursuit of those violating the law in a state park or historical site.

[10] Section 12.102 reads in full:

§ 12.102. Power to Arrest

(a) An authorized employee of the department [of Parks and Wildlife] has the same authority as a sheriff to arrest, serve criminal process, and require aid in serving criminal process in connection with violations of the laws relating to game, fish, and birds. The department may receive the same fees as are provided by law for sheriffs in misdemeanor cases.

(b) An authorized employee of the department may arrest without a warrant any person found in the act of violating any law relating to game, birds, or fish.

[11] The regulations may govern:

(1) the conservation, preservation, and use of state property whether natural features or constructed facilities;

(1971, No. M-838) (authorizing game management officers of the Parks and Wildlife Department to assist in enforcing provisions of the Antiquities Code of Texas, Tex. Stat. Ann. art. 6145-9 [Vernon 19]).[12]

Thus, the law enforcement authority of game wardens is limited both geographically and functionally. Game wardens have the powers of peace officers while on state parks or in hot pursuit of those violating the law in a state park. Parks and Wildlife Code sec. 11.019. This power presumably includes the authority to arrest without warrant on probable cause pursuant to article 14.03 of the Code of Criminal Procedure. Moreover, a game warden's law enforcement authority extends in some cases outside of state park lands. Thus, an employee of the Parks and Wildlife Department may "enter on any land or water where wild game or fish are known to range or stray" in order "[t]o enforce the game and fish laws of the state. . . ." Parks and Wildlife Code sec. 12.103.[13] However, not all transgressions are

---

(2) the abusive, disruptive, or destructive conduct of persons;

(3) the activities of park users including camping, swimming, boating, fishing, or other recreational activities;

(4) the disposal of garbage, sewage, or refuse;

(5) the possession of pets or animals;

(6) the regulation of traffic and parking; and

(7) conduct which endangers the health or safety of park users or their property.

[12] In Texas courts, the Attorney General's opinions are not binding authority; however, they are persuasive. *Gonzales v. State*, 588 S.W.2d 355, 359 (Tex. Cr. App. 1979).

[13] The right to enter enclosed land includes the power to do so without the owner's permission and without a search warrant when a game warden knows that wild game or fish are likely to have strayed onto the land. *Opinion of the Attorney General* (1947, No. V-22). However, a game warden may not search without warrant a house or dwelling, *Opinion of the Attorney General, supra*; or a grain elevator, even when it was believed to contain illegally killed deer. *Opinion of the Attorney General* (1946, No. O-7047).

fair game for a warden: detection and prevention of gaming law violations is the *only* law enforcement function which Parks and Wildlife employees are authorized by the Code to perform outside of state park lands.

The Government argues that even if Huff's "normal powers" were limited to gaming law violations, his statutory status as peace officer gave him additional powers. They cite to article 14.03 of the Code of Criminal Procedure, which provides that peace officers may arrest without warrant "persons found in suspicious places and under circumstances which reasonably show that such persons have been guilty of some felony . . . or are about to commit some offense against the laws. . . ."

Article 14.03 is apparently an effort on the part of the Texas legislature to codify the ever-shifting formulae for describing circumstances which create probable cause to effect a warrantless arrest. *See, e.g., Lara v. State*, 469 S.W.2d 177, 179 (Tex. Cr. App. 1971) (where officers had "probable cause" to suspect criminal activity, arrests were authorized under article 14.03), *cert. denied*, 404 U.S. 1040, 92 S.Ct. 724, 30 L.Ed.2d 732 (1971). We have found no Texas cases construing article 14.03 in relation to the specific limitations of the authority of game wardens set forth in the Parks and Wildlife Code.[14] Thus, we are forced to roam into other statu-

---

[14] In *Gonzales v. State*, 588 S.W.2d 355 (Tex. Cr. App. 1979), the Court found illegal a warrantless search by game wardens which revealed marijuana on defendants' property. However, the decision was based on constitutional grounds; the Court did not reach the issue of how far a game warden's statutory law enforcement authority extends outside of state parks. Nevertheless, it is interesting to note that the State sought to justify the warden's search on the basis of Parks and Wildlife Code sec. 12.103, which allows department employees to enter any land in order to investigate gaming law violations, and *not* on the grounds that the wardens had general law enforcement authority by virtue of their status as peace officers.

tory territory in search of clues to the proper construction of these Code provisions.

The Code Construction Act[15] provides general rules for the interpretation of statutes.[16] Section 3.06 of the Act states:

> If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later enactment and the manifest intent is that the general provision prevail.

Thus, the Act adopts a long-standing rule for the construction of statutes which are in *pari materia*. Statutes are in *pari materia* when they relate to the same person or class of persons, even though the statutes contain no reference to each other. 53 Tex.Jur.2d Statutes, sec. 186. When statutes are in *pari materia*, they should be read together, and any conflicts should be harmonized to give effect to all provisions of each statute. *Id.* When statutes in *pari materia* conflict and cannot be harmonized, the specific controls over the general. *Id.*

Turning to the statutes at issue, we find that article 14.03 of the Code of Criminal Procedure describes in general terms the types of circumstances giving rise to probable cause and thus justifying an arrest without warrant. Section 11.019(b) of the Parks and Wildlife Code states that game wardens "have the powers, privileges and immunities of peace officers *while on state parks*...." Clearly, article 14.03 is in *pari materia* with

---

[15] Tex. Rev. Civ. Stat. Ann. art. 5429b-2 (Vernon 1981).

[16] The Code Construction Act is applicable to provisions of the Code of Criminal Procedure. *E.g. Ex Parte Harrell*, 542 S.W.2d 169, 172 (Tex. Cr. App. 1976); *Cuellar v. State*, 521 S.W.2d 277 (Tex. Cr. App. 1975).

section 11.019(b): both describe the powers of peace officers. In such a situation, the courts are instructed to construe the statutes "so that effect is given to both." Code Construction Act, art. 5429b-2, sec. 3.06. Accordingly, article 14.03 must be interpreted as describing circumstances under which a game warden may arrest without warrant on probable cause *when the game warden is a peace officer;* that is, while he is on a state park. Outside of state parks, however, Parks and Wildlife Code, article 12.102 still controls: game wardens may arrest with or without a warrant only in connection with violations of the gaming laws.

This interpretation of the statutes is mandated as well by the rule that a specific statute controls over a general one. Article 2.12 of the Code of Criminal Procedure provides a comprehensive list of city and state employees who are, or may be commissioned as, peace officers.[17] Article 2.13 states that "it is the duty of every

---

[17] Article 2.12 provides in full:

The following are peace officers:

(1) sheriffs and their deputies;

(2) constables and deputy constables;

(3) marshals or police officers of an incorporated city, town, or village;

(4) rangers and officers commissioned by the Public Safety Commission and the Director of the Department of Public Safety;

(5) investigators of the district attorneys', criminal district attorneys', and county attorneys' offices;

(6) law enforcement agents of the Alcoholic Beverage Commission;

(7) each member of an arson investigating unit of a city, county or the state;

(8) any private person specially appointed to execute criminal process;

(9) officers commissioned by the governing board of any institution of higher education, public junior college or the Texas State Technical Institute;

(10) officers commissioned by the Board of Control;

(11) law enforcement officers commissioned by the Parks and Wildlife Commission;

peace officer to preserve the peace *within his jurisdiction*...." (Emphasis added.) The jurisdictional limits of peace officers are set forth in the statutory provisions dealing specifically with the powers and duties of the individuals listed in article 2.12.

For instance, article 2.12(12) lists as peace officers "airport security personnel." Article 46g of the Municipal Airports Act[18] provides that any peace officer commissioned under the Act shall have all of the powers and duties of a peace officer "*while he is on the property under the control of the airport*, or in the actual course and scope of his employment." (Emphasis added.) Thus, airport security personnel have the power to act as peace officers, including the authority to arrest without warrant on probable cause pursuant to article 14.03 of the Code of Criminal Procedure. However, they have this power only when they are on airport property or otherwise engaged in airport security functions.

Similarly, article 2.12(9) of the Code of Criminal Procedure lists as peace officers "officers commissioned by the governing board of any state institution of higher learning...." Section 51.203 of Title 3, *Higher Education*,[19] states that an officer commissioned under that section is vested with all of the powers and privileges of peace officers "*while on the property under the control and jurisdiction of the institution of higher education* or otherwise in the performance of his duties." (Empha-

---

(12) airport security personnel commissioned as peace officers by the governing body of any political subdivision of this state that operates an airport served by a Civil Aeronautics Board certified air carrier;

(13) municipal park and recreational patrolmen and security officers; and

(14) security officers commissioned as peace officers by the State Treasurer.

[18] Tex. Rev. Civ. Stat. Ann. art. 46d-1 *et seq.* (Vernon 1981).

[19] Tex. Civ. Stat. Ann. tit. 3, § 51.203 (Vernon 1972).

sis added.) Accordingly, campus security personnel may act as peace officers only on university property or in the course of their employment as campus security guards.

If we read article 14.03 of the Code of Criminal Procedure in the manner urged by the Government, article 14.03 would give all peace officers listed in article 2.12 the authority to arrest at any time and any place upon suspicion that any offense has been committed, notwithstanding the specific territorial and substantive limitations on their authority set forth in statutory provisions applicable to each category of peace officer. Such a reading is possible only if it can be demonstrated that "the manifest intent is that the general provision prevail" over the specific provisions. Code Construction Act, art. 5429b-2, sec. 3.06. We have found nothing in the statute or in the case law[20] which indicates that the general description of circumstances giving rise to probable cause for warrantless arrests set forth in article 14.03 was intended to repeal all specific territorial and/or substantive limitations on peace officers' law enforcement authority set forth in sections of the codes and statutes dealing with the powers and duties of the individual state and city employees listed in article 2.12. Accordingly, the interpretation compelled by the Code Construction Act is that individuals listed in article 2.12 have the powers and duties of peace officers, including the power to make warrantless arrests and

---

[20] *Green v. State*, 490 S.W.2d 826 (Tex. Cr. App. 1973), cited by the Government, is not dispositive. In that case, the Court held that a city policeman had the authority to arrest a person who had been observed driving while intoxicated inside of the city limits but was finally arrested outside of the city limits. *Green v. State* provides no answer to the question whether a statute speaking in general terms about the power to arrest should be read as overruling specific statutory limitations on the *types* of offenses *e.g.*, gaming law violations, for which a state employee may make arrests.

the duty to keep peace, *only* when acting within their respective jurisdictional limits.

In some instances, the jurisdiction of peace officers is narrowly limited, as in the case of airport security personnel or university campus guards. For other categories of peace officers, such as Texas Rangers, the statutory grant of law enforcement authority is quite broad.[21] But for all article 2.12 peace officers, law enforcement jurisdiction is defined and limited by statute.

In the case of game wardens, article 11.019(b) of the Texas Parks and Wildlife Code states that they have the power to act as peace officers while on state parks. In addition, game wardens may enter onto any land or water, and may make arrests, in connection with violations of the gaming laws. Beyond these enumerated powers, however, game wardens have no more law enforcement authority than any other private citizen of the state of Texas.[22] In sum, we do not read the Texas

---

[21] Tex. Civ. Stat. Ann. chapter 5, *Department of Public Safety*, art. 4413(11) (Vernon 1976) defines the jurisdiction and authority of Texas Rangers. Article 4413(11)(4) states that as peace officers, Texas Rangers have the same powers and duties as sheriffs; except that, unlike sheriffs, Rangers "shall be authorized to make arrests and execute all process in criminal cases *in any county in the state*." (Emphasis added.)

[22] Of course, an employee of the Parks and Wildlife Department may, like any other private citizen, effect a citizen's arrest. A private citizen may arrest without warrant a person who has committed a felony or offense against the peace in the arresting person's presence or within his or her view. Texas Code of Criminal Procedure § 14.01(a) (Vernon's 1977).

In *Sanchez v. State*, 582 S.W.2d 813 (Tex. Cr. App. 1979), *cert. denied*, 444 U.S. 1043, 100 S.Ct. 728, 62 L.Ed.2d 728 (1980), two United States Border Patrol agents detained appellant after noticing him speeding and subsequently finding him stopped at the side of the road, emanating a strong odor of alcohol. The Court held that although the agents lacked authority to arrest or detain except for violations of the immigration laws, the detention of appellant was nevertheless a legal citizen's ar-

statutes as vesting in a game warden cosmic arresting authority.

Defendants' Arrests

None of the events which led to the arrests of these defendants took place in a state park. Game warden Huff testified that at the time he first spotted the tanker-truck driven by defendant Mungia, Huff and Saenz were sitting on a hill on the Rosa Ranch, approximately 12.8 miles north of Rio Grande City and 100 yards off Highway 3167.[23] When Huff spotted the tanker-truck being driven along a private ranch road on the Rosa property without lights, he thought that criminal activity might be afoot. He did *not*, however, sus-

---

rest for an offense against the peace (public drunkenness) pursuant to article 14.01. *Id.* at 815.

In the instant case however, the Government has not argued that the detention and arrest of appellants can be justified as a citizen's arrest under article 14.01. Indeed, no such argument can be made, since it is not contended that driving without lights on a private road is even illegal, much less a felony or an offense againt the peace. Whatever suspicions of criminal activity may have been harbored by Huff, he did not testify that a felony was actually committed by any of the applicants in his presence or within his view. Compare *Sanchez v. State, supra; Romo v. State*, 577 S.W.2d 251 (Tex. Cr. App. 1979) (member of Buffalo Springs Lake Patrol could effect valid citizen's arrest outside of his jurisdiction when he personally observed defendant's erratic, drunken driving); *Heck v. State*, 507 S.W.2d 737 (Tex. Cr. App. 1974) (private security guard and off-duty police officer could effect valid citizen's arrest of individual who they observed to be drunk in a public place); *McEathron v. State*, 163 Tex. Cr. R. 619, 294 S.W.2d 822 (1956) (airforce captain who observed defendant driving erratically and drinking from a bottle could effect a valid citizen's arrest).

[23] Huff and Saenz were authorized to be on the Rosa Ranch without the owner's permission or a search warrant if they knew that wild game were likely to have strayed onto the land. Parks and Wildlife Code sec. 12.103; *Opinion of the Attorney General, supra* at n.5.

pect that the truck was in any way connected with or involved in violations of the gaming laws. Rather, he was concerned that the truck might either be stolen or carrying a load of marijuana.[24] It was on this basis, and this basis alone, that Huff stopped the truck, arrested Mungia, and searched the tanker-trailer. Huff, as a game warden commissioned by the Parks and Wildlife Department, had no authority to stop this or any other vehicle outside of state park grounds for any reason other than suspected violations of the gaming laws. Be-

---

[24] In the pretrial hearing concerning suppression of the evidence found as a result of Huff's stop of the tanker-truck, the following exchange between the district judge and Huff transpired:

> THE COURT: You didn't initially make the stop [of the tanker-truck] in connection with any purported violation of game laws?
>
> WITNESS HUFF: No, sir.
>
> THE COURT: Why did you say you stopped it?
>
> WITNESS HUFF: Because the vehicle was coming out of a pasture without any lights.
>
> THE COURT: Okay.
>
> WITNESS HUFF: I had prior knowledge that there had been some stolen vehicles in that area. An 18-wheeler, for example. And also one thing I didn't say.
>
> . . .
>
> WITNESS HUFF: And one other thing I didn't say, is that I had been talking with CPO (Customs Patrol Officer) Bill Matthews, say, about two days prior. We were discussing drug trafficking. He was discussing it with me and telling me to be sure and keep my eyes out for any kind of large vehicles, say, like 18-wheelers or anything; that they were using these types of vehicles to haul marijuana in.
>
> THE COURT: And that is what led you to stop this vehicle?
>
> WITNESS HUFF: Correct.
>
> THE COURT: Okay. It had nothing to do with a game law violation?
>
> WITNESS HUFF: No, sir, it didn't.
>
> MR. MEDRANA [Attorney for the Government]: That statement is included in your statement; is that correct?
>
> WITNESS HUFF: That is correct.

cause the stop of the tanker-truck and the arrest of Mungia were in no way connected with actual or suspected gaming law violations, the stop and arrest were illegal.

Similarly, the stop and arrests of Garcia and Barrera were unlawful. Huff was not investigating gaming law violations when he stopped the vehicle in which Garcia and Barrera were travelling. Rather, the trial court found that in stopping the pickup truck, Huff relied on his knowledge of the contents of the tanker-truck, and the fact that the pickup truck travelled without lights upon the same ranch road from which the tanker-truck had recently emerged. Because the stop and arrests by the game warden were not based on actual or suspected gaming law violations, the stop and arrests were illegal.

Having found that defendants were illegally arrested, it follows that the evidentiary fruits of those unlawful arrests should not have been introduced at defendants' trial. The Government contends, however, that even if the arrests in this case were illegal, the fruits of these arrests ought not be suppressed if game warden Huff believed in good faith that he had general law enforcement authority.

As we have stated, the legality of these arrests by a Texas game warden is determined by state law. *Ker v. State of California*, 374 U.S. 23, 37, 83 S.Ct. 1623, 1631, 10 L.Ed.2d 726 (1963); *U.S. v. Di Re*, 332 U.S. 581, 589, 68 S.Ct. 222, 226, 92 L.Ed. 210 (1947); *U.S. v. Ible*, 630 F.2d 389, 392-393 (5th Cir. 1980); *U.S. v. Fossler*, 597 F.2d 478, 482 n.3 (5th Cir. 1979); *U.S. v. Lipscomb*, 435 F.2d 795, 798 (5th Cir. 1970), *cert. denied*, 401 U.S. 980, 91 S.Ct. 1213, 28 L.Ed.2d 331 (1971). Under Texas law, an arresting officer's good faith does not suffice to purge an unlawful arrest of its illegality insofar as the exclusion of evidence is concerned. Thus in *Green v. State*, 615 S.W.2d 700 (Tex. Cr. App. 1980), *cert. denied*, ____ U.S. ____, 102 S.Ct.

490, 70 L.Ed.2d 258 (1981), the court excluded evidence obtained as the fruit of an arrest made pursuant to an invalid arrest warrant. The majority did not accept the argument urged in dissent[25] that the evidence should be admissible by virtue of a good faith exception such as that set forth in *U.S. v. Williams*.[26] It is not this Court's role to engraft a "good faith" exception onto Texas jurisprudence. Thus in this case, where an arrest was unlawful under Texas statutes, the game warden's good or bad faith can have no bearing on our decision to exclude the illegally obtained evidence.

Conclusion

The district court erred in finding that the warrantless arrests of defendants were authorized under Texas law,[27] and in failing to exclude the evidence obtained by virtue of those unlawful arrests. Accordingly, the convictions of appellants Mungia, Garcia and Barrera are

REVERSED.

---

[25] *Green v. State, supra* at 712.

[26] 622 F.2d 830, 840-47 (5th Cir. 1980) (en banc), *cert. denied*, 449 U.S. 1127, 101 S.Ct. 946, 67 L.Ed.2d 114 (1981).

[27] Because we find that defendants' arrests were illegal under state law, we do not reach the question as to whether the district court erred in finding that the arrests were supported by probable cause; nor do we decide whether there was sufficient evidence to sustain the convictions of appellants Garcia and Barrera.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 19

No. 81-2115

D.C. Docket No. CRIM-80-00568

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

versus

VICTOR DOMINGO GARCIA, RUBEN BARRERA-SAENZ and ADAN MONTOLLA MUNGIA, DEFENDANTS-APPELLANTS.

Appeal from the United States District Court for the Southern District of Texas

Before BROWN, GOLDBERG and GEE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the Urited States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed.

May 28, 1982

ISSUED AS MANDATE: DEC 30 1982

OP-JDT-9

APPENDIX C

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

DECEMBER 20, 1982

No. 81-2115

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

VICTOR DOMINGO GARCIA, RUBEN BARRERA-SAENZ AND ADAN MONTOLLA MUNGIA, DEFENDANTS-APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

ON PETITION FOR REHEARING

Before BROWN, GOLDBERG and GEE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing, 676 F.2d 1086, filed in the above entitled and numbered cause be and the same is hereby DENIED. *See Christopher v. State*, No. 61, 679, slip op. at 3 (Tex. Crim. App. Oct. 20, 1982) (en banc).

APPENDIX D

RULING OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS ON DEFENDANTS' MOTION TO SUPPRESS EVIDENCE

January 7, 1981

MR. KAZEN: That is correct, Your Honor. We have no witnesses.

MR. DUVALL: Same announcement.

THE COURT: Why didn't you tell me this last Monday and I wouldn't have brought you here at 7:30. I didn't anticipate you would be done for two or three hours.

MR. DUVALL: We didn't know how long the Government was going to go.

THE COURT: There is some effort to my madness. We needed this courtroom. All right, Gentlemen, let me explain as would regard the motion of the defendants in connection with the matter of whether or not a Parks and Wildlife Service Deputy Game Warden has the authority to arrest. I believe that the statute, that is, 11.019 and 11.020, limits the authority of the deputy game wardens. However, that authority is enlarged in Article 2.12, in which they are given authority, and sequence thereto, to be considered as peace officers and fully authorized to conduct themselves with any matters involving violations of law. That is is the ruling of the court as would regard that issue.

As would regard what I consider to be the more delicate issue of the arrest and subsequent search, I wish to make the following findings in that regard, which will later be reduced to writing for all purposes that any side wish to use as far as this matter is concerned:

I am of the opinion that the evidence shows, to my satisfaction, that the officer in question, that is, the deputy game warden, had prior to this time information regarding thefts of trucks involving 18-wheelers and

the like. And that was the evidence. And had information regarding activities involving narcotics traffic.

I further find that on the occasion in question there was unusual conduct, in that the parcel of land in question is one upon which there were no oil wells, no dairy farms, and to the knowledge of the officer would not have any reason to have any tank trucks.

I further find that the hour in question leads to the conclusion there was unusual conduct, in that it was at night; that the road in question was well known by the officer, who has testified as being a very rough road, and it would be very unusual for any vehicle of this type to drive without lights on; that all of this, together with the information that he had, as would regard the area and what in my judgment constitutes unusual conduct, would constitute probable cause as would regard Mungia. As would regard the other persons, my recollection of the evidence is, that there was a strong odor of marijuana, but those circumstances also dictate in my judgement [sic] that probable cause existed.

And, hence, all motions to suppress are hereby expressly denied. Every defendant's respective exception will be preserved in full. Anything else at this time, gentlemen?

MR. MEDRANO: Nothing further from the United States, Your Honor.

THE COURT: Anything else at this time?

MR. DUVALL: Nothing from Defendant Barrera.

* * * * *

THE COURT: All right. Now, Gentlemen, as would regard the MOTION TO SUPPRESS, the court made some findings of record as would regard Mr. Mungia, and stated them in the record at the time I denied the motion. The court failed of record, although he did expressly deny the motion as would regard the other defendants, to make such findings. And I want the record to show that the findings justified in the court's mind

probable cause as would regard the tank truck; that it be made a part of the record as would regard the matter involving the pickup truck that came from the same area; that in addition thereto, the court would add findings as would regard the area in which the pickup truck emerged from. The fact that it did not have lights and the additional information that had been obtained by the officer when he searched the tank truck, all of this, in the court's mind, constitute probable cause as would regard the stop and the arrest of the persons in the pickup truck which numbered three, two of whom are in trial at this time: Victor Domingo Garcia and Ruben Barrera-Saenz. Your exceptions to the court's ruling are preserved. Anything else at this time, Gentlemen?

82-1549

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA

v.

VICTOR DOMINGO GARCIA, ET AL.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

MICHAEL KENNEDY, Esq.
MICHAEL KENNEDY, P.C.
148 East 78th Street
New York, New York 10021
(212) 737-0400
Attorneys for Respondents Victor Domingo Garcia, Adan Montolla Mungia and Ruben Barrera-Saenz

JOSEPH CALLUORI
Of Counsel

Questions Presented

1. Whether this Court lacks jurisdiction to review the decision in the instant case because the indictment in the instant case was dismissed upon the government's motion.

2. Whether the court should refuse to review the arguments raised in the government's petition for a writ of certiorari because the government failed to timely present these arguments to either the District Court or the Court of Appeals.

3. Whether the petition for writ of certiorari should be dismissed because the issue presented for review is an issue of state law.

Parties to the Proceeding

In addition to the parties shown by the caption of this case, Ruben Barrera-Saenz and Adan Montolla Mungia were appellants below and are respondents here.

TABLE OF CONTENTS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA

v.

VICTOR DOMINGO GARCIA, ET AL.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Victor Domingo Garcia, Adan Montolla Mungia and Ruben Barrera-Saenz, through the undersigned counsel, move for the dismissal of the Solicitor General's petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit in this case.

Opinions Below

The opinion of the court of appeals (App. A in government's brief, 1a-17a) is reported at 676 F.2d 1086. The ruling of the district court denying respondents' motion to suppress evidence (App. D, in government's brief) is unreported.

Jurisdiction

The judgment of the Court of Appeals was entered on May 28, 1982. A petition for rehearing was denied on December 20, 1982. Upon the government's motion, the

indictment was dismissed on January 12, 1983. On February 9, 1983, Justice Rehnquist extended the time to file a petition for a writ of certiorari to and including March 20, 1983. As set out more fully at pages 13-17 *infra*, respondents submit that dismissal of the indictment effectively extinguished a live case and controversy and this Court, therefore, lacks the power to review the decision in this case. In addition, this Court lacks jurisdiction to review the decision of the Court of Appeals, because only a question of state law is involved.

Statement

Victor Domingo Garcia, Ruben Barrera-Saenz, and Adan Montolla Mungia were all arrested October 17, 1980, and charged with conspiracy to possess marijuana with the intent to distribute it in violation of 21 U.S.C. § 846 (Count I), and with possession of the 2,073 pounds of marijuana in violation of 21 U.S.C. § 841(a)(1) (Count II). Following a jury trial in the United States District Court for the Southern District of Texas respondent Mungia was convicted of possessing marijuana with intent to distribute, in violation of 21 U.S.C. § 841(a)(1), and respondents Garcia and Barrera were convicted of conspiring to commit that offense, in violation of 21 U.S.C. § 846.

Prior to their trial, respondents moved to suppress the evidence as obtained in violation of their Fourth Amendment rights since it was (1) seized without probable cause to arrest or to search the vehicle containing the marijuana and without reasonable suspicion for the stop, and (2) the arrests were illegal because the arresting officer, a Texas state deputy game warden, had no authority to arrest them. The following testimony was adduced at a pretrial hearing on the suppression motion.

Deputy Game Warden Christopher Huff—the sole government witness to testify about the circumstances

which led to the arrest of respondents—stated that on October 17, 1980, he and Deputy Game Warden Hilario Saenz, were perched upon a hill on the Rosa Ranch some 12.8 miles north of Rio Grande City, Texas, and 100 yards off Highway 3167 (61, 63, 67, 110, 144).[1] Huff was looking for poaching and rustling activities (62, 110). Though he thought himself to be a peace officer, he understood his job to be concerned exclusively with gaming violations (62, 177). He had no idea whether he possessed general law enforcement authority (127).

A short time after the pair had nested on the knoll, one vehicle, wholly unidentifiable in the darkness except for its noisy muffler (111), approached them coming north on 3167. Three hundred yards from the lookout hill, however, the vehicle turned around and headed back south (62, 111). Though it may or may not have had its lights on at all times (111, 402), it was not followed.

At approximately 10:15 p.m., the deputy game warden heard a "loud noise" which prompted Huff to scan the area with a pair of binoculars (62, 63). According to his testimony at the suppression hearing, Huff then saw an eighteen wheel diesel semi-truck with a tank trailer some 300 yards away being driven without lights on a ranch road within the Rosa property (63, 65, 68).[2] At trial,

---

[1] Numbers in parentheses refer to the original Record on Appeal which consists of the transcript of proceedings (Vols. II—VIII, pp. 1-1403), and all original papers filed (Vol. I, pp. 1404-1610). Where reference is made to matters which are also containd in the Record Excerpts, prepared by defendants pursuant to Local Rule 13.1, a cite to "RE" is also made.

[2] Some mention has been made of Huff's assertions that the Rosa Ranch was neither a dairy farm nor an oilfield (136-137, 153-154). On cross-examination, however and with the aid of a map, he admitted that areas west, east and south all contained oilfields (155-156), upon which the presence of a tank truck would raise nary an eyebrow. Indeed, it was revealed during the trial that the Rosa Ranch itself had at least one oil storage tank (376).

however, Huff corrected this testimony, stating that the moving object was 1,000 yards away (302 and *see* 533) and, in light of the geography of the area, i.e., the brush, he could not have seen the moving vehicle or, its lights.[3] Eventually, the truck intersected Highway 3167, and at that point its lights were on (63, 65, 68, 307, 498).

The vehicle was being driven in a wholly lawful manner, including its possible lack of illumination while on a private road (117, 118). Nor was there any suspicion that the vehicle was involved in a violation of the gaming laws.

Huff assumed, however, that the vehicle was either (a) stolen; or (b) being used to haul marijuana; or (c) being used for cattle rustling (72, 128, 146). These assumptions were premised upon the following: (a) the lack of headlights; (b) Huff's knowledge that there had been stolen vehicles in the area;[4] and (c) Huff's knowledge that large trucks had been used to haul marijuana (72, 105). Huff's knowledge with respect to stolen vehicles was over three months old. While working with Sheriff's Officers from Hidalgo County he "learned" of a stolen grain hauler. This vehicle, however, was not even the subject of a BOLO ("be on the lookout") (121-122). The information about the use of large trucks to haul marijuana consisted of what might have been a casual conversation between Huff and one Bill Matthews, a Customs Patrol Officer (106, 142).

Based upon the aforementioned suspicions the deputy game wardens took off in pursuit of the vehicle to stop it and search it (507-508). At a point approximately one-

---

[3] The likely inability of a similarly situated viewer to see the lights of a vehicle traveling on that road was confirmed by Larry Gene Medina, a land surveyor, who performed tests in the area on behalf of the defendants (861).

[4] The "area" was not defined, but Huff appeared to be responsible for the entire Rio Grande "area" (59).

half mile from the point at which the truck turned on to the public highway, Huff and Saenz did stop the vehicle (73). Deputy Warden Huff, armed with a Magnum .357 (119-120), and Deputy Warden Saenz, possibly armed with a shotgun (120), approached the vehicle, with Huff walking towards the driver's side and Saenz covering the passenger side (73, 75).

Defendant Adan Montolla Mungia (hereinafter "Mr. Mungia") the driver, emerged from the vehicle (75, 76), was confronted by Huff, and produced a seemingly valid[5] State of Texas commercial operator's license upon request (76, 118). Huff asked the driver what he was doing (77), and Mr. Mungia responded (a) that he had come from a ranch further south, (b) that he was supposed to pick up a load from the Las Escobar Ranch,[6] but (c) that he was having difficulty locating the property, and (d) was considering returning home to Robstown (77, 154). Questioned further about his employer, he stated only (3) that he worked for "a gringo" (78, 154).

Though Mr. Mungia was not informed he was under arrest at this point, Huff testified that he would have prohibited Mr. Mungia from leaving (119), and that the only reason he requested the license was to learn the driver's identity in the event he did flee (119).

Finding Mr. Mungia to be "acting nervous," Huff "advised him [he] was going to search his vehicle" (78, 124, 154). To do so, he hoisted himself or jumped seven feet to the first rung of the tank truck's ladder and climbed the ladder to the top of the vehicle where the entry hatch was located (79, 130-131), whereupon he inspected the exterior

---

[5] Huff testified that he never checked the validity of the license (118), nor did he even compare the photograph with the producer (118). He did note, however, that there was nothing suspicious about the license (118).

[6] The Las Escobar ranch was in fact only 18 miles away and could be reached by driving along Highway 3167 (115, 507).

and noted what he considered to be "marijuana residue" (79, 131).[7] He unscrewed the wheel which bolts the hatchway and, upon opening the hatch, first smelled what he identified as marijuana (79, 131). Using a flashlight and peering into the tank, he discovered sacks, later identified as marijuana-filled (79, 131).

Mr. Mungia was thereafter handcuffed (80), though still not read his rights (82), and placed in the game wardens' vehicle. Saenz remained with the truck (81), presumably still with his shotgun, and Huff and Mr. Mungia returned to the intersection of Highway 3167 and the ranch road (81).

Concealing his car at a point where he could still retain a view of any vehicle traveling on the same ranch road upon which Mr. Mungia's vehicle had allegedly traveled (81), Huff spotted a 1976 Chevrolet pickup truck emerging from the road, supposedly without lights (87). (Hereinafter, the "beige pickup.")

Huff stopped this vehicle and ordered its three occupants—Angel Garza Soliz, Victor Domingo Garcia, and Ruben Barrera Sanez[8]—to "step out" (89).[9] They were

---

[7] That view could not have been had from the ground (132, 375).

[8] Mr. Garcia is a prominent rancher in Starr County. At trial, he and Mr. Barrera, his friend and occasional employee, said that they had spent the afternoon and part of the evening attending to chores on Garcia's land (1012-1025). Garcia was driving Barrera to a hospital where Barrera's daughter was recovering from surgery when a tire on his vehicle—the white pickup mentioned at page 7, *infra*—was punctured (1025). There was no spare tire, and consequently Garcia and Barrera got out and started walking. Near a trailer bordering property owned by one Bermudez, the men saw the headlights of the beige pickup (1026). They stopped the pickup and the driver agreed to give them a ride (211, 1027-1028).

[9] Though Huff testified that he did not draw his gun, both Garcia (1035) and Barrera (1217) testified that he did.

not sweaty nor did they smell of marijuana, but they were placed under arrest nonetheless (340).

Garcia and Barrera thought that they were going to be shot. Mr. Garcia, who knew Huff from the area, told him "we are not going to hurt you" (92, 97, 1029, 1036). Ignoring Mr. Garcia's plea for both an explanation of what was going on (1041), and an opportunity to translate Huff's commands into Spanish for the benefit of Mr. Barrera (1033), the three were frisked, their wallets removed (1035); and an ammunition clip for a .45 handgun was found in Mr. Garcia's back pocket (90).[10] When asked whether there were any weapons around, Mr. Garcia informed Huff that his pistol was "in front" of the vehicle (90) and a Colt .45 was thereafter retrieved by Huff (96).[11]

Huff then called for assistance from the Starr County (Texas) Sheriff's Department (97). Within 15 minutes aid had arrived (98), and Huff was free to search the property for Mr. Garza (99), who had absconded into the brush while Huff was occupied with radioing for assistance (97-98).

Heading southwest and following tracks in the dirt road (247), he and Starr County Deputy Sheriff Reynaldo Saenz unlocked an iron gate (99, 602-3, 606), the key for which Huff possessed and was a common one in the area used by many ranchers (888, 896). There they came upon the vehicle which Messrs. Garcia and Barrera had just left (100, 250).[12] Though the cab was locked (257), the

---

[10] In addition, a small quantity of marijuana in a plastic bag was found in Mr. Garza's boot (94).

[11] Mr. Garcia testified that he never partrolled his lands without a weapon, for there had been "trouble" recently (1020, 1040, 1079). Though he normally relied upon a rifle which he kept in his pickup truck (1041), since his wife had the vehicle that day, he resorted to another weapon (1041).

[12] See footnote 8 at page 6, *supra*.

two officers examined it and the bed with a flashlight (256, 587, 593, 598, 614). Neither saw any marijuana in the bed of the truck (256), though Huff claimed he saw "marijuana residue" (crushed leaves and seeds) in the area "around" the vehicle (101, 256).

The two returned to the rendezvous scene, that is, the point where the beige pickup had been stopped, by which time several Customs Patrol Officers (CPO's) had arrived (274). Forgetting about the escaped prisoner (625), three CPO's then accompanied Huff (625) and Deputy Warden Saenz, who had then returned (274, 465-6) to re-examine the white truck.

Though CPO Ochoa claimed to have seen "marijuana residue" on the rim of one tire and an outer bumper[13] (628), she neither pointed it out to anyone (636), nor preserved any of it (635). In addition, perhaps overcome with excitement at her first marijuana seizure (640), she trampled over the "residue" on the muddy ground and climbed into the bed of the truck for a closer search (641-642). It was not, however, until the following day, after the truck had been driven to the Customs lot in Rio Grande City (637), that another agent, also crawling about the bed, found a minute quantity of marijuana which was actually preserved as evidence (750).[14]

During this period CPO Aldrete approached Mr. Garcia, the first to entertain the latter's inquiries about his predicament (718). It was then that Garcia volunteered information about the flat tire on a white pickup truck, prior to receiving information that it had been found (718).

Thereafter, CPO Flores searched Mr. Garcia for a key to the vehicle, which he readily supplied (677). In addi-

---

[13] Ms. Ochoa was unable to describe marijuana or distinguish it from Buffalo grass (640, 647), which was widely cultivated on the property (1016).

[14] Similarly, a minute quantity of marijuana was found in the beige vehicle (750).

tion, Mr. Garcia had a master key, which predictably, fit the lock to the iron gate (665, 678).

Thereafter, Flores and yet another CPO, Springer, examined the white pickup, this time including the formerly locked interior (697). This netted no more than a 2-way radio (740).[15]

At trial, no additional information linking either Mr. Garcia or Mr. Barrera to marijuana trafficking, or to Mr. Mungia, was adduced. A Mr. Raudel Garza (no relation to the accused) (1110) testified that he was a neighbor of Mr. Garza and had lent the beige pickup to him that day, at the latter's request (1106). No connection between any of the defendants and the vehicle was ever shown.

Interestingly, the government pressed the fact that the tracks of "a large vehicle" could be traced *to* the white vehicle, *around* the white vehicle and then *back* to the road (*e.g.* 252), the obvious inference being that the "larger vehicle," namely the tank-truck, had turned around in the presence of Mr. Garcia's pickup.

The inference however, was laid to rest by testimony of Basilio Cano, an independent trucker with 20 years' experience driving 18-wheel trucks, who testified that, given the conditions present on that road, namely the fence, the plowed fields, the texture of the narrow road, an 18-wheel vehicle was required to turn right and "loop" in order to turn in that corner of the pasture, irrespective of whether there was a stalled car in the road (1131, 1146).

Also important is Cirio Conrado Rosa's testimony that he owned a "low boy," or 20-wheel vehicle, which he used to transport heavy machinery (930). As recently as early October (931) the low boy had been in that very spot (931),

---

[15] Unlike other cases involving the trafficking in controlled substances, the vehicles allegedly involved in this case could not communicate by radio. Neither the tank-truck nor the beige pickup had a 2-way radio (1188).

fully capable of making the tracks which the government had attributed to the marijuana-laden vehicle (933-948). Having failed to either photograph (*e.g.*, 744) or cause a cast to be made to record and compare the distinct impression that particular tires make in the dirt, none of the speculation could be confirmed.

At the conclusion of the suppression hearing the trial judge ruled that there were sufficient suspicious circumstances to justify the search and that a deputy game warden does have general law enforcement power under applicable Texas law (158, RE 15-7). The trial judge later amended these findings to include a finding that probable cause existed to search the vehicle occupied by Soliz, Garcia, and Barrera in light of (a) the discovery of marijuana in the Mungia vehicle, and (b) its failure to have headlights on (167, RE 20). Another ruling was made after the government, contrary to a prior understanding, sought to introduce evidence about marijuana residue on a tire and bumper of the white pickup truck (410-420). The trial judge denied suppression finding that, in light of its prior ruling, there was probable cause to search and the discovery and search of this vehicle was proper (453, 457, RE 22, 25).

The Court of Appeals for the Fifth Circuit reversed the District Court, holding that the marijuana should be suppressed. Because state officers arrested respondents, the Court used Texas law to determine the legality of their arrests. The Court concluded that, under the applicable Texas statutes

> Game wardens have the powers, privileges, and immunities of peace officers while on state parks . . . Outside of parks, however . . . game wardens may arrest with or without a warrant only in connection with violations of the gaming laws. 676 F.2d at 1091.

Because the arrests were not premised upon a suspected violation of Texas game laws, and did not occur on a Texas

state park, the Court held that they were unlawful, and the evidentiary fruits of these arrests should not have been introduced at respondents' trial.[16] The court also rejected the argument that because Deputy Game Warden Huff believed that he was a peace officer the evidentiary fruits of respondents' arrests were admissible under the "good faith" exception recognized in *United States* v. *Williams*, 622 F.2d 830, 840-847 (5th Cir. 1980) (*en banc*), *cert. denied*, 449 U.S. 1127 (1981). After noting again that Texas law controlled the legality of respondents' arrests, the Court observed that under Texas law, an arresting officer's good faith does not suffice to purge an unlawful arrest of its illegality as far as the exclusion of evidence is concerned, and that it was not the Fifth Circuit's role to engraft a good faith exception onto Texas jurisprudence.

On July 9, 1982, counsel for respondents was served with a Petition for Rehearing. The government argued that rehearing was warranted on the grounds that (a) a three judge panel of the Texas Court of Criminal Appeals had recently held in *State* v. *Christopher*, 639 S.W.2d 932 (Tex. Crim. App. 1982), that a game warden has general authority to arrest, and (b) because the Fifth Circuit should have used federal rather than state law to determine the legality of respondents' arrests. Respondents moved for, and were granted, permission to file an answer

---

[16] In its petition for certiorari the government suggests that Huff could have made a lawful citizen's arrest under Article 14.01(a) of the Texas Criminal Procedure Code. The Fifth Circuit rejected that argument:

> The government has not argued that the detention and arrest of appellants can be justified as a citizen's arrest under article 14.01. Indeed, no such argument can be made, since it is not contended that driving without lights on a private road is even illegal, much less a felony or an offense against the peace. Whatever suspicions of criminal activity may have been harbored by Huff, he did not testify that a felony was actually committed by any of the appellants in his presence or within his view. 676 F.2d at 1093, n. 22.

to the Petition for Rehearing. Respondents requested the Court to postpone reconsideration of its decision pending a decision by the Texas Criminal Court of Appeals on Christopher's petition for a rehearing *en banc*. Respondents also argued that the government's second claim—i.e., that state rather than federal law should have been used to determine the legality of respondents arrests—could not be raised on a Petition for Rehearing because the government could have raised that argument in either the District Court or in its brief for the Fifth Circuit, but had failed to do so.

On October 20, 1982, the Texas Criminal Court of Appeals sitting *en banc* rendered a decision on Christopher's petition for rehearing. The Court upheld the legality of Christopher's arrest by a game warden for a traffic infraction noting that Article 6701(d) Sec. 153, V.A.C.S. expressly provided any peace officer, including game wardens, with authority to arrest for traffic violations. The Court, however, explicitly rejected the argument Art. 14.03 of the Code of Criminal Procedure provided game wardens with general arrest powers:

> We do not agree with the panel opinion that Art. 14.01(b), *supra*, creates a *general* power for any peace officer to arrest without a warrant under the stated conditions. That article is part of Chapter 14, which delineates the circumstances under which no warrant is required for an arrest. It does not purport to delineate who is a peace officer . . . To hold that Art. 14.01(b) authorizes any peace officer to arrest for any offense would effectively render meaningless all specific grants of authority, such as the Parks and Wildlife provisions quoted above . . . It would also give deputy constables and municipal park patrolmen (Art. 2.12(a) and (13), *supra*), state-wide jurisdiction. We do not believe the legislature intended such a result. 639 S.W.2d at 937.

Citing the above language as evidence that the Texas Criminal Court had effiectively disposed of the only viable ground for rehearing in the instant case, the respondents moved for dismissal of the Petition for Rehearing in the instant case. On December 20, 1982, the Fifth Circuit denied the government's Petition for Rehearing citing the *en banc* decision in *Christopher*. On January 11, 1983, the government moved for dismisal of the indictment. By an order dated January 12, 1983 the indictment was dismissed on grounds of the Fifth Circuit decision.

On February 9, 1983, nearly a month after the dismissal of the indictment, Justice Rehnquist extended the government's time to file a Petition for a Writ of Certiorari.

Subsequently, the government filed a petition seeking certiorari on the grounds that (a) the Court of Appeals extended the reach of the Fourth Amendment exclusionary rule beyond its extended scope; (b) that the Court erroneously declined to apply its own good faith exception to the exclusionary rule in this case; and (c) that the Court erred in looking to state evidentiary rules to determine the applicability of the exclusionary rule.

Reasons for Dismissing the Petition

Respondents urge this Court to dismiss the petition because (a) there is no live case or controversy to be reviewed; (b) the government waived the arguments presented in the petition for a writ of certiorari by failing to present them to the lower courts; and (c) the Fifth Circuit's decision is premised upon state law and hence is not a proper subject for review by this Court.

A. There Is No Longer a Live Case or Controversy Warranting Review

The dismissal, on the government's motion, of the indictment in the instant case, deprives this Court of juris-

diction to entertain the government's petition for a writ of certiorari.

This Court is not empowered to decide moot questions or abstract propositions. This Court's "impotence 'to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy'" *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971) and authorities cited therein.

The dismissal of the indictment in this case effectively extinguishes any case or controversy. Because the indictment has been dismissed, it is not possible to reinstate respondents' conviction or remand for further proceedings.

The suggestion incorporated by the government's reference to its supplemental brief in *United States* v. *Villamonte-Marquez*, No. 81-1350 (filed March 15, 1983)—i.e., that respondents' convictions could be reinstated notwithstanding the dismissal of the indictment—is wholly untenable. Indeed, it ignores the fact that a valid indictment is a jurisdictional prerequisite for a judgment of conviction. *Arrington* v. *United States*, 350 F.Supp. 710 (E.D. Pa.), aff'd 475 F.2d 1394 (3rd Cir. 1973); *United States* v. *Clark*, 412 F.2d 885 (9th Cir. 1969).

Equally untenable is the government's attempt to bring this case within the rule that obedience to mandate of a lower court does not moot a case. The mandate of the Fifth Circuit did not direct the government to dismiss the indictment. Indeed, the government itself moved for the dismissal of the indictment.

Inasmuch as there is no longer a case or controversy, the petition should be dismissed.

B. Claims Not Presented Below May Not Be Reviewed by This Court

None of the arguments raised in the government's petition for a writ of certiorari were raised in the District Court. Nor did the government raise any of these arguments in the Fifth Circuit until after that Court had held that respondents' arrests were illegal under Texas law. At that point, the government, in its petition for a rehearing, protested that federal rather than state law should have been used to determine the validity of respondents' arrests.

It is the practice of this Court to decline to review matters not presented below. *F.T.C.* v. *Travelers Health Ass'n,* 362 U.S. 293, 298, n. 14 (1960); *Ullman* v. *United States,* 350 U.S. 422, 440, n. 15 (1956); *Marconi Wireless Telegraph Co.* v. *Simon,* 246 U.S. 46 (1918). Since none of the claims now advanced in the government's petition were timely presented to either the District Court or the Court of Appeals, they are not reviewable by this Court.

C. The Instant Case Presents an Issue of State Law Which Is Not Reviewable by This Court

Notwithstanding the government's claims to the contrary, the decision in this case is not a new extension of Fourth Amendment law. The Fifth Circuit simply followed long established precedent—precedent which the government decided to question only after its interpretation of Texas law was rejected—and looked to Texas law to determine the legality of arrests made by Texas game wardens.

Nor does the result in the instant case create a danger that the outcome of federal criminal prosecutions in different states will vary widely because of the idiosyncrasies of state law. The rule promulgated in *United States* v. *DiRe,* 332 U.S. 581 (1948), does not appear to have hindered the administration of justice in the federal system

and there is no reason to believe that this state of affairs will change.

Furthermore, a finding that game wardens do not under state law have general arrest powers is hardly likely to have much consequence for law enforcement. It is a fairly safe assumption that states will rely on officers other than fish and game wardens for the enforcement of criminal laws and that these other officers possess general arrest powers. Thus, a finding that game wardens in Texas or any other state do not have general arrest powers does not seem likely to result in many instances where criminals will go free as a result of an unlawful arrest.

Indeed the government has not shown any justification for this Court to abandon years of precedent and to burden itself with the task of creating a federal law of arrest.

While the federal government's interest in the activities of fish and game wardens in a particular state is minimal, states obviously have a substantial interest in defining the scope of a game warden's authority to make an arrest, and in deterring the unauthorized activity through the application of the exclusionary rule. Texas has obviously chosen not to carve out a good faith exception to its exclusionary rule. Proper deference to Texas's legitimate interest in discouraging illegal action on the part of game wardens even if such action is done in good faith, mandates that federal courts suppress the fruits of unauthorized arrests made by Texas game wardens.

In short, the decision of the instant case is not a novel extension of Fourth Amendment, but simply an application of Texas law. The correctness of the Fifth Circuit's interpretation of Texas law, moreover, was confirmed by the Texas Criminal Court of Appeals sitting *en banc*. Since there is no federal question involved here this Court lacks jurisdiction to review the case. *Cramp* v. *Board of Public Instruction of Orange County, Fla.*, 318 U.S. 278 (1961); *Jankovich* v. *Indiana Toll Road Commission*, 379 U.S. 487 (1965).

CONCLUSION

For the above-stated reasons this Court should dismiss the petition for writ of certiorari.

MICHAEL KENNEDY, Esq.
MICHAEL KENNEDY, P.C.
148 East 78th Street
New York, New York 10021
(212) 737-0400
Attorneys for Respondents Victor Domingo Garcia, Adan Montolla Mungia and Ruben Barrera-Saenz

JOSEPH CALLUORI
Of Counsel

No. 82-1549

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

VICTOR DOMINGO GARCIA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1549

UNITED STATES OF AMERICA, PETITIONER

v.

VICTOR DOMINGO GARCIA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

Respondents offer three arguments in opposition to the petition for a writ of certiorari in this case. They contend (Br. in Opp. 13) that the case is moot because the indictment has been dismissed, that the government did not properly preserve in the courts below the questions on which it seeks this Court's review, and that the petition presents only a question of state law over which this Court lacks jurisdiction. As we show below, respondents' contentions are all lacking in merit.

1. As we noted in our petition (at 9 n.7), and in our supplemental brief in *United States* v. *Villamonte-Marquez*, No. 81-1350 (filed Mar. 15, 1983), the dismissal of the indictment does not affect this Court's jurisdiction to hear this case. Because the issue will presumably be decided by the Court in *Villamonte-Marquez* in any event, we see no need to elaborate further upon our position. For present purposes, it is sufficient to note that the cases cited by

respondents (Br. in Opp. 14) are fully consistent with our position. In *Arrington* v. *United States*, 350 F.Supp. 710 (E.D. Pa. 1972), aff'd, 475 F.2d 1394 (3d Cir. 1973) (table), the court observed that a defendant "cannot be *prosecuted* unless a valid indictment has been returned against him" (*id.* at 711; emphasis added). The court went on to note, however, that a valid indictment "is sufficient to *start* a trial of the charge on the merits and satisfies the requirements of the Fifth Amendment" (*id.* at 712; emphasis added). Thus, as we pointed out in our supplemental brief in *Villamonte-Marquez* (at 3), an indictment is required only to *try* a defendant on federal felony charges. Where, as here, whatever disposition of the case is made by this Court will not, in any event, result in a retrial, the necessity for the indictment ceases. Nothing in *Arrington* suggests the contrary. Similarly, in *United States* v. *Clark*, 412 F.2d 885 (5th Cir. 1969), the court reversed a conviction upon finding that "the conduct for which [defendant] was convicted was not an indictable offense * * *" (*id.* at 886). In other words, the indictment was invalid ab initio and could not support the conviction under any circumstances. Here, respondents raise no question concerning the sufficiency of the original indictment, nor do they dispute the fact that no retrial will occur in this case. Thus, as in *Villamonte-Marquez*, the need for the indictment has long since come to an end.

2. Respondents incorrectly argue (Br. in Opp. 15) that the questions presented by the petition were not raised in the courts below until the government filed its petition for rehearing in the court of appeals.[1] Respondents first

---

[1] As we demonstrate below, respondents' argument is factually incorrect. It should also be noted, however, that respondents cite no authority for the proposition that issues squarely presented to a court of appeals in a rehearing petition are not properly preserved for this Court's review. Indeed, the Court has suggested that this is not so. See *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977).

chastise the government for not presenting its arguments to the district court. But they conveniently overlook the fact that the district court ruled in the government's favor, denying respondents' motions to suppress the evidence, even before the government had an opportunity to complete the presentation of its case in opposition to the motions (Tr. 157-158; see also Pet. 6-7). Thus, there was no reason, and no occasion, for the government to argue in the district court that federal rather than state law should govern the outcome of this case or that, in any event, the Fifth Circuit's "reasonable mistake" exception to the exclusionary rule (see *United States* v. *Williams*, 622 F.2d 830, 840-847 (1980) (en banc), cert. denied, 449 U.S. 1127 (1981)) should apply here.

Respondents also mischaracterize the proceedings in the court of appeals. On appeal, the first argument presented by respondents (appellants below) was that the officers lacked reasonable suspicion to justify the stop of the tanker truck and also lacked probable cause either to arrest respondent Mungia or to search the tanker truck; accordingly, respondents argued that the fruits of the search should be suppressed (Appellants' Brief 17). In a footnote, respondents stated (*id.* at 17-18 n.*; emphasis added):

> The analysis [in appellants' brief] relies exclusively upon federal law, though the initial interference with Defendant Mungia's liberty was caused by two Texas *state* officers. Ordinarily, the legality of a state arrest is tested by reference to state law * * *. *Nevertheless, since the district court relied exclusively on federal law, we have continued. Ultimately, of course, the state of Texas is bound by the Fourth Amendment requirement of reasonableness, so the result here should be the same.* * * *

Respondents also acknowledged that the same *federal* legal analysis governed the question whether there was probable cause to arrest respondents Garcia and Barrera-Saenz (*id.* at 32).

In response, the government likewise analyzed the reasonable suspicion and probable cause issues under federal law (see U.S. Br. 11-20). Thus, implicit in both respondents' and the government's approach to these questions in the court of appeals was the assumption that the applicability of the exclusionary rule turned on whether the officers had complied with the *federal constitutional* standards of reasonable suspicion and probable cause. That is precisely the first question presented by the petition (see Pet. I, 9-19). Admittedly, the issue could have been more precisely identified in both sides' briefs to the court of appeals, but that is no reason for arguing that the court of appeals had no opportunity to rule on the question. Moreover, any ambiguity in the government's approach to the case was unquestionably resolved in our petition for rehearing, in which the second question presented was as follows (Pet. for Reh. 2):

> 2. Assuming that Texas game wardens do not possess general arrest powers, whether the exclusionary rule should be applied in a federal criminal trial to the fruits of an arrest that meets federal constitutional standards but is deficient under state law.

Quite clearly, this is the same issue as that presented by the first question in the petition. Thus, there can be no credible argument in this case that the court of appeals was denied the opportunity to pass on the first question that we ask this Court to review.

Finally, there is not the slightest doubt that the "reasonable mistake" issue, presented by the second and third questions in the petition (Pet. I), was properly preserved at all stages of the appeal.[2] See U.S. Br. 23; Pet. for Reh. 6. (Respondents do not explain how it is that the court of appeals came to rule explicitly on this issue (see Pet. App. 16a-17a) if, as they contend, it was not even presented.)

3. Respondents' final argument is frivolous. They contend (Br. in Opp. 16) that "there is no federal question involved here" because the court of appeals simply applied Texas law; accordingly, respondents argue (*ibid.*) that "this Court lacks jurisdiction to review the case." In support of this novel contention, respondents cite two cases that came to this Court from state supreme courts (*Jankovich* v. *Indiana Toll Road Commission*, 379 U.S. 487 (1965); *Cramp* v. *Board of Public Instruction*, 368 U.S. 278 (1961)). In both cases, of course, the Court was required to determine whether the state courts' decisions rested on independent and adequate non-federal grounds that would have defeated the Court's jurisdiction under 28 U.S.C. 1257. Obviously, no such rule applies to this Court's certiorari jurisdiction under 28 U.S.C. 1254(1), which authorizes review of *any* final judgment rendered by a federal court of appeals. See, *e.g.*, R. Stern & E. Gressman, *Supreme Court Practice* § 2.1, at 52 (5th ed. 1978) (footnote omitted) ("It is to be noted that the jurisdiction thus granted [under 28 U.S.C. 1254(1)] is of an extremely comprehensive nature. It extends to 'any civil or criminal case' in the courts of

---

[2]The third question presented by our petition (whether application of a "reasonable mistake" exception to the exclusionary rule in a federal criminal proceeding is a matter of state or federal law) is merely a subpart of the second question presented (whether a "reasonable mistake" exception should have been applied in this case).

appeals. There are no * * * restrictions as to the matter at issue or the nature or form of the decision below").

In any event, the government does not seek review of the court of appeals' ruling that Texas game wardens lack general arrest powers under state law. Rather, the questions we present are quintessentially matters of federal law, going to the heart of the rules applicable to federal criminal prosecutions. As we explained in our petition (at 14-15, 21-23), state law is totally irrelevant to the correct resolution of the questions we present.

CONCLUSION

For the reasons stated above and in our petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
Solicitor General

MAY 1983

DOJ-1983-05